Supreme Court, U.S.
FILED
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No. 05- ____

In the Supreme Court of the United States

JAMES NORBERT GREEN,
Petitioner,

v.

PROVIDENCE MEDICAL CENTER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan

PETITION FOR WRIT OF CERTIORARI

DOUGLAS A. MCKINNEY
Counsel of Record

P.O. BOX 214145
AUBURN HILLS, MI 48321
(248) 601-1689

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

Question 1;

Was Petitioner not under arrest (not seized within the meaning of the Fourth Amendment) when he encountered respondents as was held in the instant case above or, was he under arrest (seized within the meaning of the Fourth Amendment) when he encountered respondents as was held in his criminal case ***People v Green***, 260 Mich App 392, 394; 677 NW2d 363 (2004)?

Question 2;

Does any statute, rule or existing precedent allow Respondent's to treat in any way an injured or uninjured person presented by the Police without his or her informed consent or court order?

Question 3;

Given the supervisory presence of Police and absent informed consent or court order did the Respondents execute a search and seizure requiring a warrant under the Fourth Amendment?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT RULE 29.6

The only parties in the court below are listed in the caption to the petition.

Petitioner; James Norbert, Green makes the following disclosure:

1. Said party is a human being not a fiction of law.

2. There is no publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome.

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OPINIONS BELOW

The Petitioner seeks leave to appeal the order of the Michigan Supreme Court (Case No. 128338) dated December 5, 2005 denying him leave to appeal the unpublished opinion of the Court of Appeals (Case No. 250706) dated February 17, 2005 upholding the decision of the Oakland County Circuit Court (Case No. 2002-044342-CZ) dated October 13, 2003 granting Summary Disposition to Respondents.

BASIS FOR JURISDICTICTION

The Petitioner seeks leave to appeal the order of the Michigan Supreme Court (Case No. 128338) dated December 5, 2005 denying him leave to appeal.

The Basis for this Courts Jurisdiction flows from Article III of the United States Constitution of 1791 as amended and 28 USC §1257.

CONSTITUTIONAL AND STATUTORY PROVISSIONS INVOLVED

U.S. Const. Amend. IV, and XIV; The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Michigan Const 1963, art 1, §11; the person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without

describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

Act 368 of 1978, Article 6, SUBSTANCE ABUSE, PART 65 INCAPACITATED PERSONS (333.6501...333.6523) 333.6521 Records confidential; disclosure.

Records of the diagnostic evaluation, psychiatric, psychological, social service care, and referral of an individual which are maintained in connection with the performance of an approved service program or emergency medical service authorized or provided under this part **are confidential and may only be disclosed in either of the following circumstances:**
(a) For the purposes and under the circumstances expressly authorized under section 6112 or 6113...

MCL §333.6111 Records confidential; limitations on disclosure.
Records of the identity, diagnosis, prognosis, and treatment of an individual maintained in connection with the performance of a licensed substance abuse treatment and rehabilitation service, a licensed prevention service, an approved service program, or an emergency medical service authorized or provided or assisted under this article are confidential and may be disclosed only for the purposes and under the circumstances authorized by section 6112 or 6113.

MCL §333.6113 Disclosure of record without consent.
If an individual who is the subject of a record maintained under section 6111 does not give written consent, the content

of the record may be disclosed only as follows:
(a) To medical personnel to the extent necessary to meet a bona fide medical emergency.
(b) To qualified personnel for the purpose of conducting scientific statistical research, financial audits, or program evaluation, but the personnel shall not directly or indirectly identify an individual in a report of the research audit or evaluation or otherwise disclose an identity in any manner.
(c) Upon application, a court of competent jurisdiction may order disclosure of whether a specific individual is under treatment by an agency. In all other respects the confidentiality shall be the same as the physician-patient relationship provided by law.
(d) Upon application, a court may order disclosure of a record for the purpose of a hearing under section 6124 or 6126.

MCL §333.20201; Policy describing rights and responsibilities of patients or residents; adoption; posting and distribution; contents; additional requirements; discharging, harassing, retaliating, or discriminating against patient exercising protected right; exercise of rights by patient's representative; informing patient or resident of policy; designation of person to exercise rights and responsibilities; additional patients' rights; definitions.

MCL §600.2157 Physician-patient privilege; waiver.
Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon...

MCL §764.25b Body cavity search.
Sec. 25b.
(1) As used in this section:
(a) "Body cavity" means the interior of the human body not visible by normal observation, being the stomach or rectal cavity of a person and the vagina of a female person.
(b) "Body cavity search" means a physical intrusion into a body cavity for the purpose of discovering any object concealed in a body cavity.
(2) Except as otherwise provided in this section, a search of a body cavity **shall not be conducted without a valid search warrant**.

42 USC §§ 1395cc(f)(1), 1396a(w)(1)
Patient Self Determination Act
On November 5, 1990, Congress passed this measure as an amendment to the Omnibus Budget Reconciliation Act of 1990. It became effective on December 1, 1991. The PSDA requires many Medicare and Medicaid providers (hospitals, nursing homes, hospice programs, home health agencies, and HMO's) to give adult individuals, at the time of inpatient admission or enrollment, certain information about their rights under state laws governing advance directives, including: **(1) the right to participate in and direct their own health care decisions; (2) the right to accept or refuse medical or surgical treatment;...**
(*Emphasis supplied*)

STATEMENT OF THE CASE

On the evening of October 4, 2000 Susan Mayer, one of two security guards on duty at the Ford Wixom plant called the 911 operator to report a possible intoxicated person having car problems in the visitor parking lot. Despite this report the police dispatcher informed the police that an unwanted person [trespasser] possibly intoxicated was at gate one. Thereafter two police vehicles pulled behind the subject vehicle. Officer Linda Fultz then observed the person put a tire iron back in the trunk and close it. Officer Fultz along with two other officers exited their vehicles and approached the person from the rear. The person had not noticed the presence of two police vehicles. Officer Fultz testified that after approaching and asking several questions she slipped behind the Petitioner and conducted a pat down search for weapons. None were found.

At this point Officer Fultz decided to handcuff the Petitioner. None of the Officers advised Petitioner that he was under arrest, or of what they intended to do. The time elapsed between when the police officers had first contact with the Petitioner until the commencing of the handcuffing was one minute.

After Officer Fultz placed one handcuff on the wrist of the Petitioner, he then began to struggle to get away from the hold on him by the three police officers. This struggle continued for 3 to 5 minutes during which the police utilized "pressure point strikes" [punches] and blinded the Petitioner with Freeze Plus P a chemical agent. The situation was ultimately resolved with the Petitioner being forced to the ground and handcuffed [seized].

Officer Fultz testified that after the Petitioner was seized Officer Watt obtained the keys from the ignition and opened the trunk to conduct a search. Officer Fultz saw from the trunk of the vehicle a briefcase that when opened contained 9-mm handgun inside.

After the briefcase and weapon was seized, about 9:24 p.m., Officer Fultz announced over the police radio that the Petitioner was under arrest and charged with CCW, OUIL, Resist & Obstruct an Officer. The Petitioner was then loaded into the back of an ambulance and transported to Providence Hospital still handcuffed hand and foot and now strapped to the gurney face down.

The Police "Use of Chemical Irritant Report" indicated no injury to subject. The ambulance personnel and hospital personnel all testified that there were no visible signs of injury and that Petitioner was objecting to, resisting and refusing any treatment. The commencement of the transport, according to police records, was at 9:42 p.m.; Petitioner arrived at Providence Hospital at 9:45 p.m.

Officer's Brazel and Ross were in the ambulance with Petitioner and Officer Fultz followed in a patrol car.

Upon arrival at Providence Hospital at about 10:10 p.m. Petitioner continually objected, resisted and refused to consent to any examination or treatment. According to testimony given Police officers give no history of an accident or other injury to admitting personnel and requested no treatment only "medical Clearance" to go to jail.

Dr. Gary March testified he conducted an examination of the Petitioner which revealed no treatable injuries, normal vital signs, and that Petitioner continually refused to consent

to any form of treatment to the extent he could being bound hand and foot and strapped to a gurney.

Despite no signs of any injury or any given reason to perform any medical treatment Dr. Gary March ordered the drawing of blood and catherization for urine. Petitioner's clothes were forcibly removed to accomplish catherization.

Officer Linda Fultz's police report indicated Doctor March released the results of Petitioner's drug and alcohol tests to her during this period.

Petitioner filed motions to Quash the information on the two counts bound over to the Circuit Court. (CCW and Resisting and Obstructing) Further, Petitioner filed a motion to dismiss the OUIL/UBAL charge. Finally, the Petitioner filed a Motion to Suppress the evidence seized from the automobile and the blood and urine tests conducted at Providence Hospital, all of which were denied by the Trial Court.

On or about November 1, 2001 Petitioner filed interlocutory leave to appeal the above motions to Quash, Dismiss, and Suppress. The Court of Appeals denied the application for failure to persuade the court of the need for immediate appellate review. (Docket No. 237558, LC No. 00-175915-FH, December, 7th 2001)

The matter proceeded to trial and the Jury returned guilty verdicts on all five counts of the information, carrying a concealed weapon (CCW), MCL §750.227, resisting or obstructing a police officer, MCL §750.479, driving while under the influence of intoxicating liquor (OUIL), MCL §257.625(1)(a), operating a vehicle with a suspended or revoked license (DWLS), MCL §257.904, and possession of

a firearm while under the influence of intoxicants, MCL §750.237. Petitioner sought a stay pending appeal in the Michigan Court of Appeals which was denied on July 31 2002.

Petitioner sought further relief in the Michigan Court of Appeals, justices ***Schuette, Murphy and Bandstra's*** published opinion upheld the trial courts decision. *See* ***People v Green***, 260 Mich App 392, 394; 677 NW2d 363 (2004) (No. 241615 published January 22, 2004).

Petitioner sought relief in the Supreme Court of Michigan which denied review. (Case No. 126018 of August 31 2004)

Petitioner sought relief in pro per from this Court which was denied on December 7, 2004 as being untimely without taking into account the day it was received by the common carrier and subtracting the holidays that fell during the period. Clayton R. Higgins, Jr. acting for William K. Suter, Clerk of this Court, denied Petitioner access to this Court.

On October 4, 2002 Petitioner filed suit alleging PROVIDENCE MEDICAL CENTER, Dr. GARY G. MARCH, BRENDA DUNHAM and MARY ANN KRIER, committed acts of; Negligence, Count I; Assault and Battery, Medical Battery and Rape Count II; Unauthorized Release of Medical Records Count III; Conversion and damage of personal property Count IV.

The Trial Court on motion of Defendants, given the same facts and circumstances of Petitioners arrest and conviction above found there was no issue of material fact that Defendants were entitled to immunity for their wrongful acts based on one paragraph in one statute MCL §333.6501 which provides immunity for the treatment of incapacitated

individuals brought in for entry into a substance abuse treatment program who are not under arrest but in protective custody. Petitioner then appealed the order entered August 13th 2003 by Judge Fred Mester of the 6th Circuit Court of Oakland County.

On or about February 28, 2004 Petitioner filled a motion at the COA for peremptory reversal of the Trial Court's Order which was denied.

An entire year later Michigan COA Justices ***Murray, Meter and Owens,*** issued their ***unpublished opinion*** (No. 250706) on February 17, 2005 finding that Petitioner was incapacitated, in protective custody, and not under arrest when he encountered Respondents.

Petitioner then sought relief in the Supreme Court of Michigan and was denied December 5, 2005 Order No. 128338.

Petitioner then requested and was granted by Justice Stevens an extension of time to file in this court until May 1, 2006 see Docket for 05A804. Petitioner now seeks redress in this Court for deprivations of his rights and liberties inflicted upon him by Respondents.

REASONS FOR GRANTING THE WRIT

I

Was Petitioner in protective custody and not under arrest when he encountered respondents as was held in the instant case or, was he under arrest when he encountered respondents as was held in his criminal case?

Based upon evidence and testimony of Respondents at his criminal trial Petitioner filed suit alleging PROVIDENCE MEDICAL CENTER, Dr. GARY G. MARCH, BRENDA DUNHAM and MARY ANN KRIER, committed acts of; Negligence, Count I; Assault and Battery, Medical Battery and Rape Count II; Unauthorized Release of Medical Records Count III; Conversion and damage of personal property Count IV.

The Trial Court granted Respondent's motion for Summary Disposition and dismissed the case, finding that there was no issue of material fact ruling the case is barred, that Petitioner ***was not under arrest***, that he was ***taken under protective custody*** pursuant to MCL §333.6501(1), that he ***was incapacitated*** under MCL §333.6104 and taken to Providence Hospital by the Wixom Police for evaluation and entry in to a drug and alcohol treatment program under MCL §333.6501 et. seq. thereby giving Respondents statutory immunity for their admitted criminal acts under MCL §333.6508(1), MCL §333.6501(1) and MCL §333.6104(3).

There is no evidence in the record to support the Trial Court's findings or, at least, there is a genuine issue of material fact as evidenced by COA Justices Schuette, Murphy and Bandstra making the opposite factual finding based upon the identical facts and circumstances as COA Justices Murray, Meter and Owens.

It has long been held by this court that drug and alcohol tests are searches within the meaning and intent of the 4th Amendment *see* ***Skinner v. Railway Labor Executives' Ass'n***, 489 U.S. 602 (1989).

In Petitioners criminal case justices ***Schuette, Murphy and Bandstra's published opinion*** (***People v Green***, 260 Mich App 392, 394; 677 NW2d 363 (2004)) held that Petitioner ***was under arrest*** to provide the Wixom Police with immunity for their unlawful searches and seizures under the umbrella of Michigan's implied consent statute.

In Petitioner's civil case Justices ***Murray, Meter and Owens,*** held in their ***unpublished opinion*** (No. 250706) of February 17, 2005 that ***Petitioner was incapacitated, in protective custody, and not under arrest*** in order to provide immunity for the criminal acts of Respondents here, PROVIDENCE MEDICAL CENTER, Dr. GARY G. MARCH, BRENDA DUNHAM and MARY ANN KRIER.

IMPLIED CONSENT LAW

The prosecution in Petitioners criminal case (***People v Green***, 260 Mich App 392, 394; 677 NW2d 363 (2004) relied upon Michigan's implied consent law, specifically MCL §257.625a (6) (e) to support admission of the blood test administered by Respondents despite their testimony that they never treated Petitioner the night in question.

MCL §257.625a (6) (e) reads as follows:

> **(e) If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment,** the

> results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis **shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subdivision.** A medical facility or person disclosing information in compliance with this subsection is not civilly or criminally liable for making the disclosure.

Petitioner's position is that this requires a three stepped process. **First**, there must be an accident. **Second**, the driver must be taken to the hospital for medical treatment resulting from injuries received in the accident. **Third**, the test must be taken by the physician for the purpose of medical treatment of those injuries.

Here, there is nothing in the record, no accident was reported; no accident report was taken or given. There was no testimony from anyone about an accident. The prosecution for the first time advanced the theory that somehow a flat tire that had been driven on the rim was an accident during Petitioner's criminal trial at the evidentiary hearing.

In ***People v. Perlos***, 436 Mich. 305, 328, 462 N.W.2d 310 (1990), our Supreme Court examined the constitutionality of the implied consent statute, and concluded:

> "We find subsection 9 to be a carefully tailored statute which only allows chemical test results to be turned over to the state under narrowly defined

> circumstances, if the state requests them. **For the statute to apply there *first must be an accident*,** a person must be taken to a medical facility, the person must have ***been the driver*** of a vehicle ***involved in the accident*,** and medical personnel must order a chemical analysis, on their own initiative, ***for medical treatment.*** This is not a sweeping abandonment of the physician-patient privilege. Prosecutors can only gain access to chemical test results. They cannot obtain all of a [446 Mich. 248] medical records, nor can they obtain a blood sample for their own discretionary testing. Consequently, within narrow parameters, the Legislature has created a minor exception to the physician-patient privilege." (*Emphasis supplied*)

In Petitioners criminal trial the circuit court erroneously found that a flat tire driven on the rim was unexpected and was an accident relying on ***Tope v. Howe***, 179 Mich.App. 91, 445 N.W.2d 452 (1989) somehow ignoring the fact no accident evidence or testimony was ever presented. The state legislature has not defined "Accident" for the purposes of the Implied Consent Statute, ***People v. Keskimaki***, 446 Mich 240 (1994) below lends some valuable insight however;

> "we believe consideration should be given to **whether there has been a collision,** whether **personal injury** [446 Mich. 256] **or property damage has resulted from the occurrence**, and whether the incident either **was undesirable for or unexpected** by any of the parties directly involved. While we do not intend this to be an exhaustive list of factors to be considered, included are those that ***we believe will appear with frequency in true "accidents;" such factors may be regarded as the distinguishing characteristics of an accident.*** (*Emphasis supplied*)

The Federal Regulations provide further insight into this apparently commonly misunderstood term;

49 CFR § 390.5 Definitions.

Unless specifically defined elsewhere, in this subchapter:
Accident means—
(1) Except as provided in paragraph (2) of this definition, an occurrence involving a commercial motor vehicle operating on a highway in interstate or intrastate commerce which results in:
(i) **A fatality**;
(ii) **Bodily injury** to a person who, as result of the injury, immediately **receives medical treatment away from the scene of the accident**; or
(iii) **One or more motor vehicles incurring disabling damage as a result of the accident**, requiring the motor vehicle(s) to be transported away from the scene by a tow truck or other motor vehicle...

The operational word here is "Collision", personal injury or property damage from a collision. In the case at bar there was no evidence of a collision. A flat tire may be undesirable but it is certainly not unexpected. Almost every car carries with it a spare tire for that occurrence. Further, the proliferation of road service indicates that the same is expected. The trial court in relying entirely upon the unpleasantness of a flat tire without requiring any of the other indices is clear error. The single most important part of the analysis in ***Keskimaki*** is that there was a collision of some sort that it was in some way unexpected and unpleasant only adds to the indicia of an "accident" and does not overpower the need for a collision. Without an accident the trial court

should have excluded the blood evidence taken by Respondents in violation of the statute.

Secondly, Petitioner was not taken to the hospital for injuries sustained during the flat tire/rim damage. All of the evidence produced in this matter confirms that the Petitioner sustained no treatable injuries either from the flat tire/rim damage or the beating inflicted upon him by the four Wixom Police Officers.

Dr. March testified at Petitioner's criminal trial in detail about the nature of his examination. Dr. March found all vital signs in normal ranges and ruled out head injuries. Dr. March testified he never engaged in any medical treatment.

What is born out from the evidence is that the Wixom Police wanted "medical clearance" performed. Wixom police, with the assistance of an ambulance company (Community EMS), brought the Petitioner to the hospital handcuffed hand and foot, bound to a hospital gurney face down. After finding no injuries to treat Dr. March ordered blood and urine tests for no stated medical purpose. The prosecution produced no evidence that the blood and urine test were performed for "medical treatment". Testimony from Dr. March during the course of the criminal trial established several undisputed facts. (1) Petitioner was brought from the Ford Wixom Plant by Community EMS accompanied by members of the Wixom Police bound hand and foot strapped to and ambulance gurney. (2) Wixom Police did not request any treatment. (3) The Petitioner did not consent to any treatment, and resisted any and all efforts of hospital personnel to examine or treat him. (4) Petitioner was not there for treatment of injuries sustained in an automobile accident or a flat tire; he was there only for "Medical Clearance" to go to jail. (5) Hospital personnel drew blood, and performed cathederization in

violation of MCL §764.25b and without his consent, a warrant or court order. Respondent's never explained to Petitioner the procedures they wished to perform and his right to refuse treatment as required by Providence Hospital Policy, both state and federal law (*See* 45 CFR parts 160,164, MCL §333.20201, MCL §600.2157) or that they intended to release the test results to Police as evidence of potential criminal conduct.

II

Does any statute, rule or existing precedent allow Respondent's to treat in any way an injured or uninjured person presented by the Police without his or her consent or court order?

In ***Ferguson v. City of Charleston***, 532 U.S. 67, 149 L.Ed2d 205, 121 S Ct 1281 (2001) this Court found that in addition to the normal consent to treatment the hospital had to under "informed consent" advise the patient that the test results would be turned over to the police as evidence of potential criminal conduct. No other exception to the warrant requirement was ever averred. These test results taken by Respondents and immediately turned over to Police were in violation of the Petitioner's Constitutional Rights. Absent some form of consent to treatment the evidence seized by the medical professional can not be used in a criminal prosecution. (*See below*)

> "The fact that positive test results were turned over to the police does not merely provide a basis for distinguishing our prior cases applying the "special needs" balancing approach to the determination of drug use. It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment. While state hospital employees, like other citizens,

may have a duty to provide the police with evidence [532 U.S. 85] of criminal conduct that they inadvertently acquire in the course of routine treatment, ***when they undertake to obtain such evidence from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require***. {24} Cf. ***Miranda v. Arizona***, 384 U.S. 436 (1966). As respondents have repeatedly insisted, their motive was benign, rather than punitive. Such a motive, however, cannot justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement with the development and application of the MUSC policy. The stark [532 U.S. 86] and unique fact that characterizes this case is that Policy M-7 was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions. While respondents are correct that drug abuse both was and is a serious problem, the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. ***Indianapolis v. Edmond***, 531 U.S. at 42-43. The Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy. See, e.g., ***Chandler***, 520 U.S. at 308; ***Skinner***, 489 U.S. at 619.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further

proceedings consistent with this opinion. It is so ordered." (*Emphasis supplied*)

See also ***Skinner v. Railway Labor Executives' Ass'n***, 489 U.S. 602 (1989)

"...Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government. See ***United States v. Jacobsen***, 466 U.S. 109,113-114 (1984); ***Coolidge v. New Hampshire***, 403 U.S. 443,487 (1971). See also ***Burdeau v. McDowell***, 256 U.S. 465, 475 (1921).

In the case at bar this "constitutional right" to been fully informed prior to consenting to medical treatment was denied. Further, in this matter the Petitioner was not only denied the right to refuse treatment, he was forcibly subjected to it by the Respondents at the direction of the Police further violating his right to be secure in his person in violation of the 4th Amendment. Respondents admitted in testimony they did not use these drug and alcohol tests for medical purposes rather it was obtained specifically for law enforcement purposes and provided to Police and used to obtain a criminal conviction. *See also* ***Union Pacific Railway Co. v. Botsford***, 141 U.S. 250 (1891);

"...No right is held more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley: "The right to one's

person may be said to be a right of complete immunity; to be let alone." Cooley on Torts 29.

This court in ***Cruzan v. Missouri Department of Health***, 497 U.S. 261 (1990) held;

"...At common law, even the touching of one person by another without consent and without legal justification was a battery. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984). Before the turn of the century, this Court observed that [n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. Citing ***Union Pacific R. Co. v. Botsford***, 141 U.S. 250, 251 (1891). This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: Every human being of adult years and sound mind has a right to determine what shall be done with his own body, ***and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.*** Citing ***Schloendorff v. Society of New York Hospital***, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914). ***The informed consent doctrine has become firmly entrenched in American tort law.*** See Dobbs, Keeton, & Owen, supra, § 32, pp. 189-192; F. Rozovsky, Consent to Treatment, A Practical Guide 1-98 (2d ed. 1990). [497 U.S. 270]" (*Emphasis supplied*)

See also the "Patient Self Determination Act" 42 USC §§ 1395cc(f)(1), 1396a(w)(1).

The Trial Court in the instant case page 3 of the transcript of October 13, 2003 states:

> **THE COURT**: This is defendant's Motion for Summary Disposition pursuant to sub seven. The claim is barred by immunity and no genuine issue of material fact.

At page 8&9 the Trial Court limits the issues:

> **THE COURT:** Let me address it. You can be seated. The issue before the Court is whether defendant is entitled to statutory immunity.
>
> MCL §333.6508(1) provides, and I'm quoting, "a law enforcement officer, a member of the emergency service unit, or staff member of an approved service program or an emergency medical service ***who acts in compliance with this part*** is acting in the course of his or her official duty, and is not criminally or civilly liable," closed quote.
>
> For purposes of MCL §333.6501(1), §333.6104 states that an individual is ***incapacitated*** when, quote, "as a result of the use of alcohol, is ***unconscious***, or has his or her mental or physical functioning ***so impaired*** that he or she either poses an immediate and substantial danger to his or her own health and safety or is endangering the health and safety of the public," close quote.

The published Opinion in Petitioner's criminal case ***People v Green***, 260 Mich App 392, 394; 677 NW2d 363 (2004) states;

> "We agree with defendant that the record, while somewhat contradictory, supports the conclusion **that he was actually arrested, in part, for OUIL**."

The Trial Court and the COA panel ignored the findings in Petitioners criminal case and granted Summary Disposition to Respondents based solely on only three sections of the statute, MCL §333.6501(1) above, the definition of incapacitated contained in MCL §333.6104, and the immunity provided in MCL §333.6508(1) improperly ignoring the rest of the statue.

> "We presume that every word has some meaning, and we must avoid any construction that would render any part of the statute surplusage or nugatory". ***People v. Borchard-Ruhland***, 460 Mich 278, 285; 597 NW2d 1 (1999). To discover legislative intent, ***provisions of a statute*** must be read in the context of the entire statute to produce, if possible, a harmonious and consistent whole. ***Michigan ex rel Wayne Co Prosecutor v Bennis***, 447 Mich 719, 732; 527 NW2d 483 (1994), aff'd 516 US 442 (1996).

Act 368 of 1978 provides:

Part 65
INCAPACITATED PERSONS

Section 333.6501	Protective custody; transportation to approved service program or emergency medical service; exception; lawful force;

	protective steps; **individual not under arrest**; entry or other record; transfer facility; emergency service unit or staff; transportation by officer; custody; emergency treatment of individual arrested; criminal prosecution and administration of tests.
Section 333.6502	**Examination and testing of individual in protective custody; informing individual of right to test**; treatment; transportation.
Section 333.6503	Continuation of protective custody; detention; consent to remain in program; discharge.
Section 333.6504	Release of individual; arrangement for transportation.
Section 333.6505	**Notice to family, next of kin, or other person.**
Section 333.6506	Voluntary admission; examination; chemical test; admission or referral; transportation; right to leave or remain; notice to family, next of kin, or other person.
Section 333.6508	Liability; gross negligence or willful and wanton misconduct.
Section 333.6510	**Possessions to be inventoried and held in secure place; return of possessions**; contraband.
Section 333.6513	Payment for treatment or transportation; liability.
Section 333.6521	**Records confidential; disclosure**.
Section 333.6523	Local law, ordinance, resolution, or rule; interpretation or application of law by local unit of government; exceptions. (*Emphasis supplied*)

It must be remembered that the analysis here is that "there is no genuine issue of material fact" under MCR §2.116(C)(10). The Trial Court armed with the law and the facts of Petitioner's criminal case came to the erroneous conclusion that there was "no genuine issue of material fact" that the ***Petitioner was not placed under arrest but was incapacitated and in protective custody*** when he arrived at Respondent's facility. Since another panel of the same Court viewing the same factual situation found that the Petitioner was under arrest, this, at the very least demonstrates that there is in fact a genuine issue of material fact precluding summary disposition in favor of Respondents.

III

Given the supervisory presence of Police and absent consent or a court order did the Respondents execute a search and seizure requiring a warrant under the Fourth Amendment?

The record supports and the Respondents have admitted they did not in fact comply with any provision of MCL §333.6501 et seq. MCL §333.6521 provides the basis for the release of medical records under the act. The Respondents admit they did in fact release all or most of Petitioner's medical records to the Prosecutors Office in violation of. MCL §333.6521 and the implied consent statute (*See* MCL §257.625(a)(6)(e) and ***People v. Perlos*** *supra*), in addition Respondents released Petitioner's drug and alcohol test information to officer Fultz the night of the incident.

During discovery Respondents supplied Petitioner with two letters from the Oakland County Prosecutors Office one of which references the returning a large portion of Petitioner's medical records, a violation of the very act from

which they now claim provides them with immunity as well as and the implied consent statute.

Respondents are not entitled to the immunity they claim with regard to this release of medical records. Even if arguendo, Petitioner "appeared to be incapacitated in a public place" and was brought in protective custody as the COA held the law specifically protects these medical records from release except to a limited group of persons for limited purposes that do not include the Police or Prosecutors. (*See* MCL §333.6521, MCL §333.6111, MCL §333.6112, MCL §333.6113 below)

MCL §333.6521 Records confidential; disclosure:

Records of the diagnostic evaluation, psychiatric, psychological, social service care, and referral of an individual which are maintained in connection with the performance of an approved service program or emergency medical service authorized or provided under this part ***are confidential and may only be disclosed in either of the following circumstances:***
(a) For the purposes and under the circumstances expressly authorized under section 6112 or 6113.
(b) At the specific written request of a parole or probation officer seeking the information with regard to a parolee or probationer in the officer's charge who agrees to release this information.

MCL §333.6111 Records confidential; limitations on disclosure.

Records of the identity, diagnosis, prognosis, and treatment of an individual maintained in connection with the performance of a licensed substance abuse

treatment and rehabilitation service, a licensed prevention service, an approved service program, or an emergency medical service authorized or provided or assisted under this article ***are confidential and may be disclosed only for the purposes and under the circumstances authorized by section 6112 or 6113.***

MCL §333.6112 Disclosure of record with consent; revocation of authorization.

§6112.
(1) An individual who is the subject of a record maintained under section 6111 ***may consent in writing to the disclosure*** of the content of the record **to**:
(a) Health professionals for the purpose of diagnosis or treatment of the individual.
(b) Governmental personnel for the purpose of obtaining benefits to which the individual is entitled.
(c) Any other person specifically authorized by the individual.
(2) The individual ***consenting*** under subsection ***(1) may revoke the authorization for the disclosure at any time***, unless expressly prohibited by federal legislation on confidentiality of alcohol and drug abuse patient records, by giving written notice to the licensee of the substance abuse service.
(3) ***The authorization or revocation shall be in a form specified by the office in accordance with regulations specifying the form of the written consent issued by the United States department of health, education, and welfare and the special action office for drug abuse prevention.***

MCL §333.6113 Disclosure of record without consent.

If an individual who is the subject of a record maintained under section 6111 ***does not give written consent***, the content of the record ***may be disclosed only as follows***:

(a) To medical personnel to the extent necessary to meet a bona fide medical emergency.

(b) To qualified personnel for the purpose of conducting **scientific statistical research, financial audits, or program evaluation,** but the personnel shall not directly or indirectly identify an individual in a report of the research audit or evaluation or otherwise disclose an identity in any manner.

(c) Upon application, ***a court of competent jurisdiction may order disclosure of whether a specific individual is under treatment by an agency. In all other respects the confidentiality shall be the same as the physician-patient relationship provided by law.***

(d) Upon application, a court may order disclosure of a record for the purpose of a hearing under section 6124 or 6126.

Here it is not disputed that there was no authorization executed by Petitioner and no Court Order requiring the release.

The statutes ("section 6124 or 6126") above limit a Court Order to the fact of whether Petitioner is or was in a drug and alcohol treatment program and ***the actual medical record is not subject to release even through a Court Order.***

CONCLUSION

Respondent's claims of immunity and the Trial Courts findings are not based in fact or law. These two opinions are in direct conflict with each other as well as the holdings of this court, federal law, state law and precedent. Respondents have admitted negligence, by their failure or refusal to abide by law and their own publicly posted policies. Respondents have admitted assault and battery by their failure to get consent, a warrant or a court order before touching Petitioner. The evidence below is also clear that the Respondent's released medical records of the Petitioner in violation of the very statue they now seek immunity from. Respondents have admitted conversion or destruction of Petitioner's personal property by their admissions of taking Respondent's blood, ripping off Petitioner's clothing to obtain urine from a body cavity. Here as in ***Ferguson supra*** there was no "special need" Respondents and Police were conspiring to violate Petitioners' constitutional protections to secure a conviction as opposed to any real or imagined treatment purposes. The words "medical clearance" in the context of this case was simply a ruse to conduct unlawful search and seizure for law enforcement purposes despite the erroneous holdings of the COA.

PRAYER FOR RELIEF

Petitioner prays this honorable Court reverse the Michigan COA's order, grant summary disposition to Petitioner pursuant to MCR §2.116(C)(9), remand for a determinatio§n of damages plus interest and any further relief as this court deems just necessary and appropriate.

April 28, 2006

Respectfully submitted,

Douglas A. McKinney
Counsel of Record
P.O. Box 214145
Auburn Hills, MI 48321
Phone (248) 601-1689
Attorney for Petitioner

APPENDIX A

SUPREME COURT OF MICHIGAN

SC: 128338

[Filed December 5, 2005]

JAMES NORBERT GREEN,
Plaintiff-Appellant,

v

PROVIDENCE MEDICAL CENTER, GARY MARCH, MARY ANN KRIER, and BRENDA DUNHAM,
Defendants-Appellees.

On Appeal From
COA: 250706
Oakland CC: 2002-044342-CZ

ORDER

On order of the Court, the application for leave to appeal the February 17, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

APPENDIX B

COURT OF APPEALS OF MICHIGAN

No. 250706

[Filed February 17, 2005]

JAMES N. GREEN,
Plaintiff-Appellant,

v

PROVIDENCE MEDICAL CENTER, GARY MARCH, MARY ANN KRIER, and BRENDA DUNHAM,
Defendants-Appellees.

On Appeal From
Oakland Circuit Court
LC No. 2002-044342-CZ

Before: Murray, P.J., and Meter and Owens, JJ.

OPINION

PER CURIAM.

Plaintiff sued defendants Providence Medical Center, medical assistant Brenda Dunham, Dr. Gary March, and

nurse Mary Ann Krier. Based on the medical care he received from them on October 4, 2000, he alleged 1) negligence, 2) assault and battery, 3) unauthorized release of medical records, and 4) conversion of and damage to personal property. Defendants moved for summary disposition. The trial court granted the motion on the ground that defendants were immune from suit. Plaintiff appealed as of right. We affirm.

On the night of October 4, 2000, police responded to a call from security personnel at Ford Motor Company's Wixom plant. Plaintiff was seen driving out of control before coming to a stop in the visitor parking lot. His car had one shredded tire, its front end was smoking, and grass and weeds were lodged in the frame, indicating that plaintiff had driven off the road and may have been in an accident. Plaintiff was visibly intoxicated. His eyes were bloodshot, his speech was slurred, and he smelled of alcohol. He responded profanely and belligerently to the initial police investigation. An altercation ensued. Five police officers and the administration of pepper spray were required to restrain him. A subsequent search of his vehicle revealed a bottle of vodka that was two-thirds full and a handgun that was loaded and not registered. The evidence led to a number of convictions already affirmed on appeal. *People v Green,* 260 Mich. App. 392, 394; 677 N.W.2d 363 (2004).

He was brought, bound hand and foot, on a gurney to defendants. He struggled to free himself, thrashed about, screamed, and spat. He refused to answer questions about his medical history. He threatened to kill others and pleaded that he too be killed. He allegedly falsely asserted that his wife was a physician, and he was an attorney. Observers described his behavior as violent, irrational, and abusive. Defendants drew a blood sample with a needle and obtained a urine

sample by a catheter. Chemical tests revealed a blood alcohol level of 0.26 percent. According to the doctor, "my intent was to medically treat any serious illnesses that could cause his behavior, that could cause him to act violently or inappropriately." Police did not ask or order the doctor to do any specific task. Plaintiff was released into the custody of police to be taken to jail approximately two hours after he was brought to the medical facility.

The Oakland Circuit Court issued an order on December 14, 2000, directing defendant Providence to produce records of the blood draw. Providence received a letter dated March 1, 2001, from the Oakland County prosecutor's office. Citing MCL 257.625a(6)(e), the letter requested, among other things, "all records related to the blood draw and subsequent toxicological analysis." Providence complied with the prosecutor's request. The court granted summary disposition under MCR 2.116(C)(7) on the ground of statutory immunity. We review summary disposition decisions de novo. *Maskery v Board of Regents of the University of Michigan,* 468 Mich. 609, 613; 664 N.W.2d 165 (2003). Statutory construction is a question of law that is subject to de novo review. *Haworth, Inc v Wickes Mfg Co,* 210 Mich. App. 222, 227; 532 N.W.2d 903 (1995).

The issues on appeal are 1) whether the court erred in its interpretation of MCL 333.6501 *et seq.,* when it found that plaintiff was incapacitated, in protective custody, and not under arrest when he encountered defendants, 2) whether defendants were entitled to immunity under MCL 333.6508, 3) whether MCL 333.6502 allows drug testing without plaintiff's consent, and 4) whether defendants lawfully released evidence of plaintiff's drug test to prosecutors.

Plaintiff first argues that the court erred when it found that plaintiff was incapacitated and in protective custody. We disagree.

> "Incapacitated" means that an individual, as a result of the use of alcohol, is unconscious or has his or her mental or physical functioning so impaired that he or she either poses an immediate and substantial danger to his or her own health and safety or is endangering the health and safety of the public. [MCL 333.6104.]

The evidence in the record conclusively demonstrated that plaintiff was incapacitated when police brought him to defendants. Plaintiff exhibited telltale signs of intoxication. He smelled of alcohol, had bloodshot eyes, and slurred his speech. He responded profanely and abusively to preliminary police questions. Multiple officers had to restrain him as he kicked and struggled. He threatened to kill others and asked that he be killed. He was poised to continue driving his already damaged car, which contained more alcohol and a loaded firearm. In light of the circumstances, plaintiff was impaired from his consumption of alcohol, and he was an immediate and substantial danger to himself and others. Plaintiff's suggestion that he could have safely left the parking lot on his own is simply untrue. Furthermore, the relevant statute only requires the appearance of incapacitation. MCL 333.6501(1). Thus, police and defendants had the following duty:

> An individual who appears to be incapacitated in a public place *shall* be taken into protective custody by a law enforcement officer and taken to an approved service program, or to an emergency medical service. . . . When requested by a law enforcement officer, an emergency service unit or staff *shall*

> provide transportation for the individual to an approved service program or an emergency medical service. [MCL 333.6501(1) (emphasis added).]

It is not clear when plaintiff was placed under arrest. The statute expressly states that police acting under section 6501(1) are not making an arrest:

> The taking of an individual to an approved service program, emergency medical service, or transfer facility under subsection (1) is not an arrest, but is a taking into protective custody with or without consent of the individual. The law enforcement officer shall inform the individual that he or she is being held in protective custody and is not under arrest. An entry or other record shall not be made to indicate that the individual was arrested or charged with either a crime or being incapacitated. An entry shall be made indicating the date, time, and place of the taking, but the entry shall not be treated for any purpose as an arrest or criminal record. [MCL 333.6501(3).]

Although the record does not indicate that police told plaintiff he was being held in protective custody and not under arrest, failure to do so does not automatically transform what happened into an arrest. Furthermore, plaintiff has not argued at what point he was arrested or for what crime. A party may not leave it to this Court to search for the factual basis to sustain or reject his argument. *People v Traylor*, 245 Mich. App. 460, 464; 628 N.W.2d 120 (2001).[1]

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[1] Plaintiff briefly argued that he was not in a public place at the time of his encounter because he was on private property. The argument is unpersuasive. As plaintiff demonstrated, any member

Plaintiff next appears to argue that summary disposition on immunity grounds was improper because defendants acted with wilful and wanton misconduct. We disagree.

Michigan grants statutory immunity to medical personnel treating an incapacitated individual who is brought in for medical treatment. MCL 333.6508 provides:

> (1) A law enforcement officer, a member of the emergency service unit, or staff member of an approved service program or an emergency medical service who acts in compliance with this part is acting in the course of his or her official duty and is not criminally or civilly liable therefor.
>
> (2) Subsection (1) does not apply to a law enforcement officer, member of the emergency service unit, or staff member of an approved service program or an emergency medical service who, while acting in compliance with this part, engages in behavior involving gross negligence or wilful and wanton misconduct.

Defendants acted in the course of their official duties when they treated plaintiff. Accordingly, they were immune unless they acted with gross negligence or they undertook willful and wanton misconduct. Plaintiff testified that defendants assaulted and battered him (from the blood draw), committed first-degree criminal sexual conduct (from the catheterization), and unlawfully released his medical records.

---

of the public can enter Ford's visitor lot at any time for others to witness. The trial court did not err when it found that plaintiff was incapacitated and in a public place.

Plaintiff claimed he was injured because the information contributed to his conviction and loss of employment. Plaintiff pleaded and proved no permanent physical injuries due to the blood draw or catheter. He presents no basis for concluding other than that defendants did their job. Rather, the documentation provided indicates that defendants were merely exploring the causes of plaintiff's condition.

Plaintiff next argues that the court erred when it found that plaintiff did not have to consent to the chemical testing. We disagree.

The plain language of MCL 333.6502(1) granted the doctor the authority to order the drug testing:

> An individual who is taken to an approved service program or emergency medical service pursuant to section 6501(1) shall continue to be in protective custody and shall be examined by a licensed physician or his or her designated representative as soon as possible, but not longer than 8 hours. The licensed physician or designated representative may conduct a chemical test to determine the amount of alcohol in the bloodstream of the individual. The physician or designated representative shall inform the individual of his or her right to such a test and shall conduct a test at the request of the individual.

The word "may" in the second sentence indicates the discretionary nature of the physician's authority. See *Old Kent Bank v KAL Kustom Enterprises,* 255 Mich. App. 524, 532; 660 N.W.2d 384 (2003) (the word "may" designates discretion). Nowhere does the statute condition that discretion on the approval of the patient. Such a condition would make little sense because the patient must be "incapacitated," which

includes under the term's statutory definition the unconscious, who cannot possibly grant consent. MCL 333.6104.

Plaintiff claims that defendants never informed him of his right to a test. Even if true, failure to do so does not erase the second sentence granting discretion. The statute only grants the individual the right to request a test, not the right to stop the doctor from ordering one. If it did, then the second sentence would be rendered useless because the same outcome would result if the statute did not contain that sentence. In construing a statute, this Court presumes that every word has some meaning and avoids any construction which would render any part of it surplusage or nugatory. See e.g., *Jenkins v Patel*, 471 Mich. 158, 167; 684 N.W.2d 346 (2004).

Plaintiff also claims that the doctor's power under the statute is merely permissive. To the extent that the authority is permissive, it is permissive at the doctor's own discretion, not that of the patient as plaintiff presumes. The doctor in this case observed plaintiff's condition and determined in his best medical judgment that tests were in order. Had defendants done otherwise, they would have ignored the possibility that plaintiff was in the grips of a debilitating medical illness requiring immediate treatment. The statute granted defendants the authority to test without the consent of plaintiff.

Plaintiff next claims that the court improperly dismissed his claim stemming from the release of his medical records. We disagree.

According to the pubic health code:

> If an individual who is the subject of a record maintained under section 6111 does not give written

> consent, the content of the record may be disclosed only as follows:
>
> * * *
>
> (c) Upon application, a court of competent jurisdiction may order disclosure of whether a specific individual is under treatment by an agency. In all other respects the confidentiality shall be the same as the physician-patient relationship provided by law. [MCL 333.6113.]

The record reveals that the confidentiality of plaintiff's records was given the same treatment under law as the physician-patient relationship, meeting the requirement of subsection (c). The circuit court issued an order directing defendants to produce records of the blood draw. Defendants later received a letter from the Oakland County prosecutor's office. Citing MCL 257.625a(6)(e), the letter requested, among other things, "all records related to the blood draw and subsequent toxicological analysis." MCL 333.6113(c) was satisfied because the qualified confidentiality of plaintiff's medical records under section MCL 257.625a(6)(e) was "the same as the physician-patient relationship provided by law." MCL 333.6113(c). According to the statute the prosecutor cited:

> If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of

> whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subdivision. A medical facility or person disclosing information in compliance with this subsection is not civilly or criminally liable for making the disclosure. [MCL 257.625a(6)(e).]

The language of the statute is clear. Defendants were required to turn over the evidence requested, and plaintiff was barred from recovering in a suit against them for disclosure. Plaintiff did not challenge the applicability of MCL 257.625a(6)(e). Evidence about the condition of plaintiff's vehicle (shredded tire and grass and weeds lodged in frame) led police to reasonably believe that plaintiff had been in an accident. Therefore, plaintiff's claim was properly dismissed.

Finally, this Court will not consider plaintiff's Fourth Amendment argument challenging the drug test as an unconstitutional search and seizure. The trial court did not hear or decide this issue. Unpreserved claims of error are generally disfavored. See e.g., *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich. 211, 234; 507 N.W.2d 422 (1993).

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

Case No. 02-044342-CZ

[Filed October 13, 2003]

JAMES N. GREEN,	)
Plaintiff,	)
	)
v	)
	)
PROVIDENCE MEDICAL CENTER,	)
GARY MARCH, MARY ANN KRIER,	)
and BRENDA DUNHAM,	)
Defendants.	)
	)

HONORABLE FRED M. MESTER
Circuit Court Judge

ORDER/RE: MOTION

This matter having come before the Court on (Plaintiff/Defendant):

Defendants' Motion for Summary Disposition or Alternatively Motion to Strike Plantiff's Claims and Motion for Sanctions,

Costs and Fees, and the Court being advised in the premises;

IT IS HEREBY ORDERED that the motion is:

Granted.

/s/_____
HON. FRED M. MESTER,
Circuit Court Judge

APPENDIX D

COURT OF APPEALS OF MICHIGAN

No. 241615

[Filed January 22, 2004]

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

JAMES NORBERT GREEN,
Defendant-Appellant.

On Appeal From
Oakland Circuit Court
LC No. 2000-175915-FH

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

OPINION

BANDSTRA, J.

Defendant was convicted of carrying a concealed weapon (CCW), MCL 750.227; resisting or obstructing a police officer, MCL 750.479; driving while under the influence of

intoxicating liquor (OUIL), MCL 257.625(1)(a); operating a vehicle with a suspended or revoked license (DWLS), MCL 257.904; and possession of a firearm while under the influence of intoxicants, MCL 750.237. He received concurrent jail sentences of 153 days for the CCW conviction, 122 days for the resisting or obstructing conviction, sixty days for the OUIL conviction, thirty days for the DWLS conviction, and ninety days for the possession of a firearm conviction. He appeals as of right. We affirm.

Basic Facts

Defendant was arrested after he drove his car, which appeared to be significantly damaged, in an erratic fashion across the grass of Ford Motor Company's Wixom plant, eventually stopping parked across several visitor parking spaces. After noticing the smell of alcohol on defendant's breath, Ford security personnel called the Wixom police, who arrived in uniform and in fully marked police cars to investigate. As the police officers approached defendant, he appeared to be preparing for a fight, then became belligerent and approached a female officer with clenched fists. After momentarily following instructions to place his hands on the trunk of the vehicle, defendant pushed away then turned toward the officers. As a result, defendant was handcuffed. Defendant then began to fight, scream obscenities and threats, and became totally out of control. The fight lasted several minutes, during which additional officers were called to assist. Defendant was eventually restrained, but continued to thrash violently and make threats for several hours thereafter.

Wixom police officers McKaig and Watt searched defendant's car after he was restrained. In an unlocked briefcase in the trunk, they found a loaded nine-millimeter handgun, several dozen additional rounds of ammunition, and

a number of documents. An open bottle of vodka was found in the interior of the car. Blood and urine tests administered at the hospital to which defendant was taken for medical care indicated that defendant's blood alcohol level was 0.266 grams per deciliter. Further facts necessary for a resolution of the issues raised on appeal are set forth below.

Unlawful Arrest—Probable Cause

Defendant first argues that he was subjected to an unlawful arrest because there was no probable cause to believe that he had committed any crime. Although defendant moved before trial to suppress evidence and quash or otherwise dismiss the charges, the issue of the legality of defendant's arrest was not raised until the middle of trial, at which point the trial court indicated that a record on the issue could be made at a later time. The record does not reveal that the issue was revisited and, accordingly, it is not preserved. See *People v Connor*, 209 Mich. App. 419, 422; 531 N.W.2d 734 (1995). Unpreserved issues are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich. 750, 763-764; 597 N.W.2d 130 (1999).

The federal and state constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. "Michigan's constitutional prohibition against unreasonable searches and seizures 'is to be construed to provide the same protection as that secured by the Fourth Amendment [of the federal constitution], absent[] "compelling reason" to impose a different interpretation.'" *People v Custer*, 465 Mich. 319, 327 n 2; 630 N.W.2d 870 (2001) (opinion by Markman, J.), quoting *People v Collins*, 438 Mich. 8, 25; 475 N.W.2d 684 (1991).

> Fourth Amendment restrictions apply to seizures of persons that are short of traditional arrests, including brief investigative detentions. There is a limited exception to the probable cause requirement for seizure of a person: Where an officer has a reasonable, articulable suspicion that a person has committed or is about to commit a crime, he may briefly stop that person for the purpose of investigation. The articulable reasons for suspecting criminal activities must derive from the police officer's assessment of the totality of the circumstances. [*People v Estabrooks*, 175 Mich. App. 532, 535; 438 N.W.2d 327 (1989) (citations omitted).]

Where "an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty and the person is not seized." *People v Shankle*, 227 Mich. App. 690, 693; 577 N.W.2d 471 (1998).

Defendant's argument is premised on the faulty claim that he was under arrest as soon as the officers approached him and tried to handcuff him. In this case, the officers' initial contact with defendant was for the purpose of attempting to investigate the complaint made by Ford security. The contact was proper because the police were acting upon a complaint of possible criminal conduct and were trying to determine whether a crime was committed or whether defendant was in need of assistance. *Custer*, *supra.* at 326-327 In addition to the initial contact being within the proper authority of the police, the police conduct in trying to secure defendant during the investigation was also proper and was not an unreasonable seizure under the Fourth Amendment. A defendant's restraint is not necessarily an arrest. In *People v Zuccarini*, 172 Mich.

App. 11, 14; 431 N.W.2d 446 (1988), the defendant was handcuffed during the execution of a search warrant. The officer who handcuffed him indicated that the restraint was mainly for the purpose of safety. This Court determined that the handcuffing was a reasonable, limited intrusion on the defendant's liberty under circumstances where violence could arise and the risk of harm to the police and others needed to be minimized. *Id.* In *People v Sangster*, 123 Mich. App. 101, 104; 333 N.W.2d 180 (1983), this Court agreed that protective measures, such as an officer drawing his weapon, do not transform a stop into an arrest. In other cases, although not raised as an issue, our courts have noted, without comment, the physical restraint of suspects during investigation. See, e.g., *People v Washington*, 468 Mich. 667, 669; 664 N.W.2d 203 (2003) (the Court indicated that the defendant was handcuffed pending further investigation after a scuffle).

The police conduct in trying to restrain defendant during the investigation was a reasonable intrusion on defendant's liberty. The safety of the officers was at risk during their lawful attempt to investigate the situation. Defendant appeared intoxicated and had led the officers to believe that he planned to fight them. He was aggressive and hostile. In addition, the officers were unaware of whether defendant possessed a weapon. They were not required to take unnecessary risks when dealing with defendant.

After the officers validly attempted to restrain defendant for safety reasons, he committed a misdemeanor in their presence, specifically, resisting or obstructing the officers. MCL 750.479. The police then had probable cause to arrest defendant. MCL 764.15(1)(a). It is unnecessary to determine whether the police had authority to arrest defendant under any other statutory provision.

Assistance of Counsel at Arraignment

Defendant next argues that he was deprived of counsel at his arraignment on the warrant. See MCR 6.104. This issue was not raised before, or considered by, the trial court and is, therefore, not preserved. *Connor*, *supra*. Unpreserved issues, constitutional and nonconstitutional, are generally reviewed for plain error affecting substantial rights. *Carines*, *supra*.

Before defendant was arraigned, the district court, in accordance with MCR 6.104(D), questioned the officer in charge about the factual basis for the complaint against defendant and determined that there was probable cause to issue a warrant. After the district court determined that there was probable cause for a warrant, defendant was arraigned in accordance with MCR 6.104(E), which provides, in pertinent part, that the court must, if the accused is not represented by a lawyer, advise the accused of the right to have a lawyer present during any questioning consented to, and, if the accused does not have the money to hire a lawyer, the right to court-appointed counsel. MCR 6.104(E)(2)(c), (d). Defendant was not represented by, nor did he request, an attorney at the arraignment. However, the trial court indicated that an attorney would be appointed and, if defendant later chose to hire his own counsel, he would be permitted to do so.

The Sixth Amendment right to counsel provides that a criminal defendant shall enjoy the right to the assistance of counsel at "critical stages" of the proceedings. See *People v Anderson (After Remand)*, 446 Mich. 392, 402; 521 N.W.2d 538 (1994). Critical stages of the proceedings are stages "where counsel's absence may harm the defendant's right to a fair trial." *People v Burhans*, 166 Mich. App. 758, 764; 421 N.W.2d 285 (1988), citing *United States v Wade*, 388

U.S. 218, 228; 87 S. Ct. 1926; 18 L. Ed. 2d 1149 (1967). In other words, the right to counsel applies to preliminary proceedings where rights may be sacrificed or defenses lost. *White v Maryland*, 373 U.S. 59, 60; 83 S. Ct. 1050; 10 L. Ed. 2d 193 (1963).

Nothing in the record indicates that the arraignment was a critical stage of the proceedings in this case during which the absence of counsel during the arraignment denied defendant a fair trial. Defendant did not waive any defenses and none of his rights were compromised. Aside from whether he understood the charges against him, defendant was not asked any questions or requested to enter a plea. Defendant's Sixth Amendment right to counsel was not violated. See *People v Horton*, 98 Mich. App. 62, 72; 296 N.W.2d 184 (1980) ("the arraignment on the warrant [is] not a critical stage in the criminal prosecution and therefore the presence of counsel is not required"); see also *People v Killebrew*, 16 Mich. App. 624, 627; 168 N.W.2d 423 (1969) ("'Critical stage' is understood to mean prosecutorial activity which has some effect on the determination of guilt or innocence which could properly be avoided, or mitigated, by the presence of counsel."). Defendant's argument that "no warrants" would have issued if he had counsel is meritless. At the arraignment the district court received the complaint from the officer and determined the existence of probable cause to charge defendant; defendant offers no reason why any different outcome would have resulted if he had had representation.

Probable Cause for Bindover

Defendant next argues that the district court abused its discretion in finding probable cause at the preliminary examination to bind over defendant for trial in the circuit

court. The questions whether the charges of resisting or obstructing and of CCW should have been quashed were raised before and decided by the trial court, which heard and denied defendant's motion to quash. Accordingly, these issues are preserved.[1] *Connor* , *supra*. "The circuit court reviews the entire record of the preliminary examination to determine whether the district court's bindover decision constituted an abuse of discretion." *People v McKinley*, 255 Mich. App. 20, 25; 661 N.W.2d 599 (2003). "This Court reviews de novo the circuit court's determination whether the district court abused its discretion*Id*. An abuse of discretion occurred if the result was so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Id*.

The district court did not abuse its discretion when it bound defendant over on the charge of resisting or obstructing. MCL 750.479 proscribes knowingly and willingly obstructing or resisting any of the listed officials in the course of their described duties. With respect to police officers, the statute is "intended to protect police officers engaged in 'ordinary police functions,' including those 'that do not directly involve placing a person under arrest.'" *People v Wess*, 235 Mich. App. 241, 243; 597 N.W.2d 215

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[1] On appeal, defendant also argues that there was not probable cause to charge him with OUIL, DWLS, and possession of a firearm while under the influence of intoxicants. Regarding the first two of these charges, there was ample record evidence that defendant was operating a vehicle while intoxicated and with a suspended license. Defendant's argument regarding whether he "possessed" a weapon is advanced only in the context of his similar argument that he did not "carry" a concealed weapon, which is considered below, and we will not consider the "possession" argument separately on appeal.

(1999), quoting *People v Little*, 434 Mich. 752, 759; 456 N.W.2d 237 (1990). Resisting arrest and interfering with an officer's attempts to perform some other official duty are two different crimes. "Although the lawfulness of an arrest is an element of the former, it is not element of the latter." *Wess*, *supra* at 244.

Contrary to defendant's assertion, the prosecution did not have to offer proof that defendant's arrest was lawful because defendant was not charged with resisting arrest. Defendant was charged with interfering with the officers in their official duty of investigating a complaint. Regardless of defendant's unsupported protestations on appeal, the police responded to the Wixom plant to investigate a situation after being called by Ford security about defendant and his car. Because there was evidence that defendant resisted or obstructed the officers while they were lawfully investigating the situation, the district court did not abuse its discretion in binding defendant over on the charge. The motion to quash this charge was properly denied by the circuit court.

Defendant further argues that his motion to quash the CCW charge should have been granted because there was insufficient evidence that he was "carrying" the gun found in a briefcase in the trunk of his car.[2] MCL 750.227(2) provides:

> *A person shall not carry a pistol* concealed on or about his or her person, or, *whether concealed or*

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[2] Defendant also argues that there was no evidence that he operated or occupied the vehicle. However, even if there were insufficient evidence presented at the preliminary examination, that deficiency is harmless because sufficient evidence was presented at trial to prove this element of the offense. See, generally, *People v Hall*, 435 Mich. 599; 460 N.W.2d 520 (1990).

> *otherwise, in a vehicle operated or occupied by the person,* except in his or her dwelling house, place of business, or on other land possessed by the person, *without a license to carry the pistol* as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license. [Emphasis added.]

Circumstantial evidence and reasonable inferences drawn from it may establish the elements of a crime. *People v Maynor*, 256 Mich. App. 238, 245; 662 N.W.2d 468 (2003), lv gtd on another ground 468 Mich. 946, 669 N.W.2d 812 (2003).

The issue presented, i.e., the meaning of the term "carry" as used in MCL 750.227(2) with respect to motor vehicles, is one of statutory interpretation.

> "In considering a question of statutory construction, this Court begins by examining the language of the statute. We read the statutory language in context to determine whether ambiguity exists. If the language is unambiguous, judicial construction is precluded. We enforce an unambiguous statute as written. Where ambiguity exists, however, this Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished."
>
> Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used, and if a term is not expressly defined in the statute, it is permissible for this Court to consult

> dictionary definitions in order to aid in construing the term "in accordance with [its] ordinary and generally accepted meaning[]." [*People v Lange*, 251 Mich. App. 247, 253-254; 650 N.W.2d 691 (2002), quoting *Macomb Co Prosecutor v Murphy*, 464 Mich. 149, 153; 627 N.W.2d 247 (2001), and *People v Morey*, 461 Mich. 325, 330; 603 N.W.2d 250 (1999) (citations omitted).]

In *People v Hill*, 257 Mich. App. 126, 145; 667 N.W.2d 78 (2003), this Court recently reiterated that undefined statutory terms are to be given their plain and ordinary meanings and that it is appropriate to consult a dictionary to obtain the definitions. The ordinary definition of the word "carry" includes to "take from one place to another," or "transport." *Random House Webster's College Dictionary* (1992). Similarly, Black's Law Dictionary (5th ed) defines "carry" as "to bear, bear about, sustain, transport, remove or convey."

This Court has stated that the purpose of MCL 750.227(2) is to prevent the carrying of unlicensed pistols in motor vehicles. *People v Cortez*, 206 Mich. App. 204, 206; 520 N.W.2d 693 (1994). The statute "recognizes the facility of motor vehicles for concealing and transporting arms." *Id.* The Legislature's intent and purpose in enacting the statute is effectuated through application of the ordinary dictionary definition of the term "carry," meaning to transport or convey. In this case, there was evidence that defendant was knowingly[3] carrying, i.e., transporting or conveying, from

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[3] Defendant does not contend that he did not know that the weapon was in the trunk. We express no opinion whether such knowledge is a necessary element of the offense, i.e., whether a defendant without this knowledge could properly be convicted.

one place to another, the pistol that was found concealed in the trunk of the car that he was driving.

In light of the ordinary definition of "carry" and the purpose of the statute, we would conclude that this was sufficient to charge and convict defendant of "carrying" a pistol in violation of MCL 750.227(2). However, the Supreme Court in *People v Butler*, 413 Mich. 377, 384-385; 319 N.W.2d 540 (1982), concluded that additional proof of "carrying," beyond mere operation of a vehicle with knowledge that it contains a weapon, is required. The Court did not define the "exact contours" of such proof, but noted factors considered in decisions from a number of other states:

> Hard and fast rules regarding what circumstantial evidence is sufficient to sustain a conviction of carrying a weapon in a motor vehicle have not evolved. The decisions have, however, emphasized the relevancy of the following factors either alone or in combination: (1) the accessibility or proximity of the weapon to the person of the defendant, (2) defendant's awareness that the weapon was in the motor vehicle, (3) defendant's possession of items that connect him to the weapon, such as ammunition, (4) defendant's ownership or operation of the vehicle, and (5) the length of time during which defendant drove or occupied the vehicle.
>
> We do not wish to be understood, by reference to the foregoing factors, as expressing any view with regard to their relevancy or importance. [*Id.* at 390 n 11 (citations omitted).]

In this case, the weapon was accessible to defendant, who was leaning inside the open trunk, in proximity to it, when first

approached by the police. The weapon was found with ammunition and other items within the brief case that connected defendant to it, and defendant owned the vehicle in which the weapon was found. Considering the factors listed in *Butler*, we conclude that there was ample evidence here to charge and convict defendant of the offense.

Right to An Independent Chemical Test

Defendant next argues that the police violated MCL 257.625a by failing to advise him of certain chemical rights under MCL 257.625a(6)(b). This issue was raised before and decided by the trial court, which determined that there was no obligation for the officers to advise defendant of his rights because he was not initially arrested for OUIL.

We review a trial court's findings of fact under the clearly erroneous standard; we review de novo questions of law. *People v Gilmore*, 222 Mich. App. 442, 459; 564 N.W.2d 158 (1997). In pertinent part, MCL 257.625a(6)(b)(i) provides that a person arrested for OUIL "shall be advised" that, "If he or she takes a chemical test of his or her blood, urine, or breath administered at the request of a police officer, he or she has the right to demand that a person of his or her own choosing administer 1 of the chemical tests." We agree with defendant that the record, while somewhat contradictory, supports the conclusion that he was actually arrested, in part, for OUIL. As such, he should have been advised under MCL 257.625a(6)(b). We disagree, however, that dismissal of the charge for OUIL was the appropriate remedy for the failure to so advise him.

The purpose of the statute was explained in *People v Dicks*, 190 Mich. App. 694, 699; 476 N.W.2d 500 (1991):

> In *People v Koval*, 371 Mich. 453, 458; 124 N.W.2d 274 (1963), our Supreme Court found that the then existing statute, which does not significantly differ from the current one, was enacted for the protection and benefit of motorists charged with driving while under the influence of intoxicating liquor. Thus, it may be said that the Legislature intended that the scientific evidence shall not be at the sole disposal of either party, and it ensured this result by allowing police to administer one test and allowing the accused to choose an independent person to administer a second chemical test.

In *People v Hurn*, 205 Mich. App. 618, 620; 518 N.W.2d 502 (1994), this Court recognized that "[d]ismissal of an OUIL charge is an appropriate remedy when a defendant is deprived of an opportunity to obtain exculpatory evidence by an independent test." See also *Koval*, *supra* at 458-459; *Dicks*, *supra* at 700-701; *People v Underwood*, 153 Mich. App. 598, 599-600; 396 N.W.2d 443 (1986). However, in *People v Dewey*, 172 Mich. App. 367, 373; 431 N.W.2d 517 (1988), this Court determined, consistently with the language and purpose of the statute, that "the right of an accused to obtain an 'independent' chemical test [is] conditioned upon the taking of a chemical test administered at the request of police officers."

Because the purpose of MCL 257.625a(6)(b) is to protect the motorist by ensuring that scientific evidence is not gathered by, and at the sole disposal of, only one party, dismissal of an OUIL charge may be appropriate where a defendant is deprived of his right to an independent test. That is not, however, the factual situation here. In this case, it is clear that the police never requested that defendant take a chemical test; instead, chemical testing was undertaken at the

hospital, as part of defendant's care. (See discussion below.) Defendant was not entitled under the statute to an independent chemical test where he did not take a test administered at the request of police officers. *Dewey*, *supra*. Thus, defendant was not prejudiced by the police officers' failure to advise him of his rights and he is entitled to no relief. See *People v Hana*, 447 Mich. 325, 358 n 10; 524 N.W.2d 682 (1994), amended 447 Mich. 1203, 524 N.W.2d 710 (1994); *People v Lucas*, 188 Mich. App. 554, 573; 470 N.W.2d 460 (1991).

Admissibility of Blood Test Evidence

Defendant next argues that results of the blood test administered at the hospital following his arrest were improperly admitted under MCL 257.625a(6)(e), the accident exception to the physician-patient privilege. This issue was raised in the trial court through a motion to suppress, which was denied. We review a trial court's findings of fact at a suppression hearing for clear error. *People v Wilson*, 257 Mich. App. 337, 351; 668 N.W.2d 371 (2003). Clear error exists where this Court is left with a definite and firm conviction that a mistake was made. *People v Callon*, 256 Mich. App. 312, 321; 662 N.W.2d 501 (2003). The ultimate decision on a motion to suppress is reviewed de novo. *Wilson*, *supra*.

MCL 257.625a(6)(e) states:

> If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled

> substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as provided in this subdivision. . . .

Defendant first argues that there was no "accident" here, as required for this statutory section to apply. In *People v Keskimaki*, 446 Mich. 240, 248-249; 521 N.W.2d 241 (1994), the Court indicated that the purpose of the accident exception is to facilitate a drunken driver's safety by eliminating any potential delay in securing prompt medical attention. The Court declined to define the term "accident" according to the expansive definition used in insurance cases. *Id.* at 250. The Court also refrained from providing a general definition of "accident" for the purposes of all criminal statutes. *Id.* at 255. Instead, it ruled "that the determination whether an accident has occurred will depend on an examination of all the circumstances surrounding an incident." *Id.* Relevant factors to consider include whether there has been a collision, i.e., a direct, violent striking together or crash, whether personal injury or property damage resulted from the occurrence, and whether the incident was undesirable for or unexpected by any of the parties involved. *Id.* at 255-256. The Court noted that the list of cited factors was not exhaustive. *Id.* at 256. The Court concluded that, in the case before it, there was no evidence to show an accident.

> The absence of a collision, personal injury, or property damage, and the seemingly expected and desired nature of defendant's actions in driving his car onto the side of the roadway, with lights on and

> engine running, compels us to conclude that the actions of the defendant cannot be construed as an accident within the meaning of the accident exception. [*Id.* at 257.]

In contrast, there was evidence of an accident here. Defendant's car was out of control, appeared to have run across grass and mud, was missing a tire, had damage to a rim, was smoking, and came to rest across several parking spaces. There clearly was property damage to the car. There was also evidence that defendant may have been injured. Witnesses described him as incoherent, violent and assaultive, and not acting like a person who was simply under the influence of alcohol. The trial court's finding that there was an accident was not clearly erroneous.

In addition to challenging the existence of an accident, defendant argues that there was no evidence that his blood was drawn for the purposes of medical treatment. Defendant's argument is cursory and devoid of citation to relevant authority and we consider it abandoned. See *Connor*, *supra* at 430. Further, the argument is meritless. In *People v Kulpinski*, 243 Mich. App. 8, 26; 620 N.W.2d 537 (2000), this Court concluded that an objection to the defendant's blood alcohol test results would have been meritless where testimony indicated that "the test was done in response to a work order from an emergency room doctor and that the blood was drawn for medical purposes." See also *People v Aldrich*, 246 Mich. App. 101, 118-119; 631 N.W.2d 67 (2001) (testimony indicated that blood was drawn for medical reasons and the results were therefore admissible under MCL 257.625a[6][e]). Similarly, in this case, defendant's blood was drawn at the request of the emergency room doctor, for the purpose of determining whether any treatment was necessary.

Vehicle Impoundment

Defendant next argues that his car was improperly impounded by the police. This issue was raised before the trial court, which denied defendant's motion to suppress evidence found when the vehicle was impounded and inventoried. Thus, it is preserved for review under the same standards employed in reviewing defendant's arguments regarding the suppression of blood test results discussed above. See *Wilson*, *supra*; *Callon*, *supra*.

In *People v Toohey*, 438 Mich. 265, 279; 475 N.W.2d 16 (1991), the Court indicated that "courts need not second-guess a police officer's exercise of professional judgment regarding impoundment of an automobile when the judgment was exercised in accordance with otherwise reasonable police department regulations." Where there is a reasonable departmental policy addressing when a vehicle may be impounded, and where the impoundment is reasonable in light of all of the facts and circumstances presented, there is no constitutional violation. *Id.* at 284-291.

Defendant argues that the city of Wixom adopted the Uniform Traffic Code promulgated by the state police. There is no evidence whatsoever on the record to support this contention. Further, there is no evidence to show that, even if that code were adopted, the Wixom Police Department did not have any additional, standard policy with respect to when a vehicle should be impounded.

To the contrary, Officer Watt testified that departmental policy calls for impoundment when a person is arrested and vehicles present a hazard or are illegally parked. Defendant does not contest the reasonableness of the department policy about which Watt testified. The testimony of police officers

may be sufficient to establish the existence of a standard procedure or routine. See *United States v Lowe*, 9 F.3d 43, 45-46 (CA 8, 1993), and *United States v Skillern*, 947 F.2d 1268, 1275 (CA 5, 1991). See also *United States v Duguay*, 93 F.3d 346, 351 (CA 7, 1996).

In this case, defendant's vehicle was on Ford Motor Company property, illegally parked across several visitor parking spaces, and was not operable because a front tire was missing. Defendant was under arrest and it was obvious that Ford personnel wanted both defendant and his car removed. The impoundment occurred because of the standard police department policy and was reasonable under the circumstances. Defendant's argument that, because the vehicle was on private property, it should not have been impounded is disingenuous. By defendant's own admission, the vehicle was trespassing on Ford's property. We will not second-guess the officers' exercise of professional judgment regarding the impoundment of defendant's vehicle.

Vehicle Inventory Evidence

Defendant next argues that evidence obtained during the inventory of his vehicle should have been suppressed. This issue was raised before the trial court, which denied a motion to suppress the evidence. Again, we review this issue under the suppression standard discussed in relation to defendant's argument regarding the blood test evidence above. *Wilson*, *supra*; *Callon*, *supra*.

In *Toohey*, *supra* at 275, the Court quoted *South Dakota v Opperman*, 428 U.S. 364, 369; 96 S. Ct. 3092; 49 L. Ed. 2d 1000 (1976), with approval to support the policy reasons for allowing inventory searches:

> "When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger. The practice has been viewed as essential to respond to incidents of theft or vandalism."

The Court ruled that "[a]n inventory search that is conducted pursuant to standardized police procedure is considered reasonable because the resulting intrusion will be limited to the extent it is necessary to fulfill the caretaking function." *Id.* at 275-276. The Court emphasized that standardized procedures protect the inventory search from being viewed as a pretext for the police to conduct an investigative search without a warrant. *Id.* at 276. "The lack of an underlying motive or bad faith by the police in conducting an inventory search is an important aspect which courts must consider in determining the validity of such a search." *Id.*

In this case, there was a standardized police procedure requiring officers to "inventory all available areas of the motor vehicle and any containers contained within that motor vehicle," and to list "all personal property of value." Watt testified that he searched the vehicle with another officer and that he inventoried all areas of the vehicle. When Watt searched the trunk, he found the briefcase, opened it to inventory it, and found papers and a handgun. They were confiscated. Defendant's argument that the search of the closed briefcase was not conducted pursuant to standardized policy is disingenuous. The policy specifically required that

the vehicle *and all containers* be inventoried. Policies requiring the opening of containers are permissible. *Florida v Wells*, 495 U.S. 1, 4; 110 S. Ct. 1632; 109 L. Ed. 2d 1 (1990); *People v Poole*, 199 Mich. App. 261, 266; 501 N.W.2d 265 (1993). The searches of the vehicle and the closed briefcase were conducted in accordance with a standardized policy, and the trial court's finding of fact in this regard is not clearly erroneous.[4]

Jury Instructions

Finally,[5] defendant argues that the trial court erred by failing to provide the jury with a number of instructions. The record is unclear about whether the various issues were preserved below; we will review them as though they were,

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[4] Defendant makes a number of arguments regarding police failures to technically comply with record keeping requirements surrounding the search. Nonetheless, the search itself was properly conducted pursuant to the policy and the failures defendant points to do not render the otherwise valid inventory search here invalid. See *United States v Mayfield*, 161 F.3d 1143, 1145 (CA 8, 1998); *United States v Looiza-Marin*, 832 F.2d 867, 869 (CA 5, 1987), citing *United States v Trullo*, 790 F.2d 205, 206 (CA 1, 1986), and *United States v O'Bryant*, 775 F.2d 1528, 1534 (CA 11, 1985).

[5] Defendant also raised issues regarding computation of sentencing guidelines and whether the statute at issue here unconstitutionally compromised his constitutional right to bear arms, neither of which need any consideration. The first is moot because defendant has fully served his sentence, *People v Rutherford*, 208 Mich. App. 198, 204; 526 N.W.2d 620 (1994), and the second is deemed abandoned because defendant only gave it cursory treatment with little or no citation of supporting authority, *People v Kelly*, 231 Mich. App. 627, 640-641; 588 N.W.2d 480 (1998).

determining whether, in their entirety, the instructions provided "fairly presented the issues to be tried and sufficiently protected defendant's rights." *Aldrich*, *supra* at 124. We do not conclude that defendant has shown any error requiring reversal. *People v Riddle*, 467 Mich. 116, 124-125; 649 N.W.2d 30 (2002).

Defendant first argues that the jury should have been instructed that evidence of his silence could not be used as a basis for conviction on the charge of resisting or obstructing an officer. However, the charge of resisting or obstructing did not relate to defendant's silence in the face of initial questions by the police but, instead, as the jury was specifically instructed, to "the words or actions of the defendant [that] in fact interfered with the officer in carrying out" his duties. This instruction effectively removed from the jury's consideration defendant's failure to respond to earlier questions from the police.

Defendant also argues that the trial court should have instructed the jury regarding statutes that exempt pistols from licensing requirements while being transported to and from certain places for certain purposes. See MCL 28.432a(h) and MCL 750.231a(1)(e). However, the facts here did not support instructions regarding these statutes, most notably because the evidence was undisputed that the weapon was fully loaded.

Defendant further contends that the statute prohibiting possession of a firearm while under the influence of intoxicants, MCL 750.237, does not allow conviction for constructive possession and that the jury should have been instructed accordingly. However, defendant cites no authority for his contention regarding the statute, it is contrary to interpretations of the word "possession" in other statutes, see, e.g., *People v Hill*, 433 Mich. 464, 470-471; 446 N.W.2d

140 (1989), and we deem defendant to have abandoned this issue on appeal, *People v Kelly*, 231 Mich. App. 627, 640-641; 588 N.W.2d 480 (1998).

We affirm.

/s/ Richard A. Bandstra
/s/ Bill Schuette
/s/ William B. Murphy

Supreme Court, U.S
FILED
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No. 05-1403

In the Supreme Court of the United States

JAMES NORBERT GREEN,
Petitioner,

v.

PROVIDENCE MEDICAL CENTER, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan

BRIEF IN OPPOSITION

JAMES T. MELLON
Counsel of Record
2301 W. BIG BEAVER
SUITE 500
TROY, MI 48084
(248) 649-1330

Counsel for Respondents

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction over this Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan when the validity of a treaty or statute of the United States has not been drawn in question and the validity of a statute of any State has not been drawn in question as repugnant to the Constitution?

2. Whether the Michigan Court of Appeals was correct in upholding the trial court's decision to grant summary disposition to Respondents when Respondents were and are statutorily immune from civil suit?

3. Whether Respondents' actions in complying with Michigan law implicated the Fourth Amendment?

4. Whether Respondents are entitled to just damages and double costs for having to respond to this clearly frivolous Petition?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT RULE 29.6

The only parties in the court below are listed in the caption to the petition. Respondent Providence Hospital and Medical Centers, Inc. is improperly named in the Petition as Providence Medical Center.

Pursuant to Rule 29.6, Providence Hospital and Medical Centers, Inc. ("Providence") makes the following disclosures:

1. Providence is owned by St. John Health.

2. St. John Health is owned by Ascension Health.

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STATEMENT OF APPELLATE JURISDICTION

This Court is without jurisdiction to entertain this Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan. Petitioner has stated in cursory fashion that jurisdiction "flows from Article III of the United States Constitution of 1791 as amended and 28 USC § 1257." (Pet. 1). As will be fully extrapolated in the Argument section of this Brief in Opposition, *infra*, the proceedings below never involved the validity of a treaty or statute of the United States or the validity of a statute of any State, as is required by 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties of, or any

commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

42 U.S.C. § 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

M.C.L. 257.625a. Arrest without warrant; circumstances; preliminary chemical breath analysis; operator ordered out-of-service; refusal of commercial motor vehicle operator to submit to breath analysis as misdemeanor; provisions applicable to chemical tests and analysis; evidence; availability of test results; admissibility of refusal to submit to chemical test.

Sec. 625a. . . . (6) The following provisions apply with respect to chemical tests and analysis of a person's blood,

urine, or breath, other than preliminary chemical breath analysis:

(a) The amount of alcohol or presence of a controlled substance or both in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding and is presumed to be the same as at the time the person operated the vehicle.

* * *

(c) A sample or specimen of urine or breath shall be taken and collected in a reasonable manner. Only a licensed physician, or an individual operating under the delegation of a licensed physician under section 16215 of the public health code, 1978 PA 368, MCL 333.16215, qualified to withdraw blood and acting in a medical environment, may withdraw blood at a peace officer's request to determine the amount of alcohol or presence of a controlled substance or both in the person's blood, as provided in this subsection. Liability for a crime or civil damages predicated on the act of withdrawing or analyzing blood and related procedures does not attach to a licensed physician or individual operating under the delegation of a licensed physician who withdraws or analyzes blood or assists in the withdrawal or analysis in accordance with this act unless the withdrawal or analysis is performed in a negligent manner. . .

M.C.L. 257.625c. Consent to chemical tests; persons not considered to have given consent to withdrawal of blood; administration of tests.

Sec. 625c. (1) A person who operates a vehicle upon a public highway or other public place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol or presence of a controlled substance or both in his or her blood or urine or the amount of alcohol in his or her breath in all of the following circumstances:

(a) If the person is arrested for a violation of section 625(1), (3), (4), (5), (6), (7), or (8), section 625a(5), or section 625m or a local ordinance substantially corresponding to section 625(1), (3), (6), or (8), section 625a(5), or section 625m.

(b) If the person is arrested for felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, and the peace officer had reasonable grounds to believe the person was operating the vehicle in violation of section 625.

(2) A person who is afflicted with hemophilia, diabetes, or a condition requiring the use of an anticoagulant under the direction of a physician is not considered to have given consent to the withdrawal of blood.

(3) The tests shall be administered as provided in section 625a(6).

M.C.L. 333.6501. Protective custody; transportation to approved service program or emergency medical service; exception; lawful force; protective steps; individual not under arrest; entry or other record; transfer facility; emergency service unit or staff; transportation by officer; custody; emergency treatment of individual arrested; criminal prosecution and administration of tests.

Sec. 6501. (1) An individual who appears to be incapacitated in a public place shall be taken into protective custody by a law enforcement officer and taken to an approved service program, or to an emergency medical service, or to a transfer facility pursuant to subsection (4) for subsequent transportation to an approved service program or emergency medical service. When requested by a law enforcement officer, an emergency medical service unit or staff shall provide transportation for the individual to an approved service program or an emergency medical service. This subsection shall not apply to an individual who the law enforcement officer reasonably believes will attempt escape or will be unreasonably difficult for staff to control.

(2) A law enforcement officer may take an individual into protective custody with that kind and degree of force which would be lawful were the officer effecting an arrest for a misdemeanor without a warrant. In taking the individual, a law enforcement officer may take reasonable steps to protect himself or herself. The protective steps may include a "pat down" search of the individual in his or her immediate surroundings, but only to the extent necessary to discover and seize any dangerous weapon which may on that occasion be used against the officer or other individuals present. These protective steps shall be taken by the law enforcement officer before an emergency service unit or staff provides

transportation of an individual to an approved service program or emergency medical service.

(3) The taking of an individual to an approved service program, emergency medical service, or transfer facility under subsection (1) is not an arrest, but is a taking into protective custody with or without consent of the individual. The law enforcement officer shall inform the individual that he or she is being held in protective custody and is not under arrest. An entry or other record shall not be made to indicate that the individual was arrested or charged with either a crime or being incapacitated. An entry shall be made indicating the date, time, and place of the taking, but the entry shall not be treated for any purpose as an arrest or criminal record.

(4) An individual taken into protective custody under subsection (1) may be taken to a transfer facility for not more than 8 hours, if there is neither an approved service program nor an emergency medical service in that county and if, due to distance or other circumstances, a law enforcement officer is unable to complete transport of the individual to an approved service program or emergency medical service. The law enforcement officer or agency shall immediately notify and request the nearest approved service program or emergency medical service to provide an emergency service unit or staff as soon as possible to transport the individual to that approved service program or emergency medical service. If neither an emergency service unit nor staff is available for transportation, a law enforcement officer may transport the individual to an approved service program or emergency medical service. If an emergency service unit or staff is to provide transportation, the designated representative of the transfer facility shall assume custody of the individual and shall take all reasonable steps to ensure the individual's health and safety until custody is transferred to the emergency

service unit or staff of an approved service program or emergency medical service.

(5) An individual arrested by a law enforcement officer for the commission of a misdemeanor punishable by imprisonment for not more than 3 months, or by a fine of not more than $500.00, or both, may be taken to an approved service program or an emergency medical service for emergency treatment if the individual appears to be incapacitated at the time of apprehension. This treatment is not in lieu of criminal prosecution of the individual for the offense with which the individual is charged, nor shall it preclude the administration of any tests as provided for by the law.

M.C.L. 333.6502. Examination and testing of individual in protective custody; informing individual of right to test; treatment; transportation.

Sec. 6502. (1) An individual who is taken to an approved service program or emergency medical service pursuant to section 6501(1) shall continue to be in protective custody and shall be examined by a licensed physician or his or her designated representative as soon as possible, but not longer than 8 hours. The licensed physician or designated representative may conduct a chemical test to determine the amount of alcohol in the bloodstream of the individual. The physician or designated representative shall inform the individual of his or her right to such a test and shall conduct a test at the request of the individual.

(2) An individual who, by medical examination, is found to be incapacitated shall then receive treatment from an approved service program or emergency medical service. An individual shall not be denied treatment solely because the individual has

withdrawn from treatment against medical advice on a prior occasion or because the individual has relapsed after earlier treatment. An approved service program or the emergency medical service may arrange for necessary transportation.

(3) Approved service programs shall not be expected to provide treatment other than that for which they are licensed, nor shall an emergency medical service be required to provide treatment other than that routinely provided for other patients treated.

M.C.L. 333.6508. Liability; gross negligence or wilful and wanton misconduct.

Sec. 6508. (1) A law enforcement officer, a member of the emergency service unit, or staff member of an approved service program or an emergency medical service who acts in compliance with this part is acting in the course of his or her official duty and is not criminally or civilly liable therefor.

(2) Subsection (1) does not apply to a law enforcement officer, member of the emergency service unit, or staff member of an approved service program or an emergency medical service who, while acting in compliance with this part, engages in behavior involving gross negligence or wilful and wanton misconduct.

(3) Approved service programs, staff of approved service programs, emergency medical services, staff of emergency medical services, law enforcement officers, and emergency service units shall not be criminally or civilly liable for the subsequent actions of the apparently incapacitated individual who leaves the approved service program or emergency medical service.

U.S. Const. amend. IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner, as he has done throughout the pendency of this case, has seriously distorted reality and chosen to provide a statement of the case which can be characterized in no other way than pure fantasy. This Petition is but one document in a long line of frivolous, harassing pleadings and papers filed by Petitioner. By way of this Brief in Opposition, Respondents shall provide this Court with the facts of the proceedings below, to wit: a true statement of the case, rather Petitioner's distorted fantasy.

On October 4, 2000, Petitioner drove his automobile in an erratic fashion across the grass of Ford Motor Company's Wixom plant. Petitioner's vehicle had a shredded front tire, its front end was smoking, and grass and weeds were lodged in the frame. (Res. Opp. to Pet. App. to Mich. Sup. Ct., Ex. B, p 67; Pet. Appx. 3a). Security personnel at the Ford plant observed that Petitioner was visibly intoxicated, and, therefore, summoned the Wixom, Michigan Police Department for assistance. (Res. Opp. to Pet. App. to Mich. Sup. Ct., Ex. B, p 73).

Upon arrival, the Wixom Police observed Petitioner near the trunk of his automobile, with a tire iron in his hand. (Res. Opp. to Pet. App. to Mich. Sup. Ct., Ex. C, p 162). Petitioner turned toward the officers, assumed a combative stance, and began shouting obscenities. (Res. Opp. to Pet.

Brief to Mich. Ct. App., Ex. C, p 166). Petitioner appeared to be preparing for a fight, and approached the officers with clenched fists. (Pet. Appx. 15a). After momentarily complying with the officers' requests, Petitioner became totally out of control and began fighting with the officers. (Pet. Appx. 15a). Petitioner was visibly intoxicated, and began pushing, shoving, kicking, screaming, spitting, yelling, and threatening to kill the officers as they attempted to subdue him. (Res. Opp. to Pet. Brief to Mich. Ct. App., Ex. C, p 167). Due to Petitioner's physically and verbally combative behavior, it took five officers and pepper spray to eventually subdue Petitioner. (Res. Opp. to Pet. Brief to Mich. Ct. App., Ex. B, p 21).

The Wixom Police searched Petitioner's vehicle, and found a loaded, unregistered 9mm handgun and an open bottle of Five O' Clock Vodka. (Res. Opp. to Pet. App. to Mich. Sup. Ct., Ex. D). Because of Petitioner's obvious intoxication, his assaultive behavior, and the fact that a chemical irritant was used against him, Wixom Police summoned Community EMS to transport Petitioner to a health care facility for a determination by a physician as to whether Petitioner required immediate medical treatment. (Res. Opp. to Pet. Brief to Mich. Ct. App., Ex. B, p 17-21).

Community EMS transported Petitioner to Respondent Providence Hospital and Medical Center ("Providence") in Novi, Michigan. During the transportation, Petitioner was admittedly thrashing, screaming obscenities, and spitting while trying to break free of the restraints necessary due to his seriously intoxicated state. (Res. Opp. to Pet. Brief to Mich. Ct. App., Ex. C, p 178-179). Upon arrival at Providence, Petitioner was violent, irrational, abusive, and reeked of alcohol. (Res. Opp. to Pet. App. to Mich. Sup. Ct., Ex. A). Petitioner made false assertions that he was an attorney and

his wife was a physician, threatened to kill members of the Wixom Police, EMS workers and hospital personnel, and pleaded with hospital personnel to kill him. (Id). Petitioner was restrained by police due to his irrational, erratic, and violent behavior.

Respondent Dr. March attempted to elicit a medical history from Petitioner to determine if his violent behavior was caused by serious illness, injury, or ingestion of a substance which could cause immediate harm or death. (Res. Opp. to Pet. Brief to Mich. Ct. App., Ex. E, p 13-21). Dr. March also had to determine whether Petitioner could be safely transported to jail or whether Petitioner needed to be admitted to the hospital for immediate treatment. (Id., p 13, 16).

Because the etiology of Petitioner's violent and irrational behavior was unknown, and in an attempt to rule out a serious medical condition, a blood sample was drawn, and a urine sample was obtained via catheterization. The results indicated a blood alcohol level of 0.26. (Res. Opp. to Pet. App. to Mich. Sup. Ct., Ex. A). This was over two and one-half times the legal limit of intoxication in Michigan.

Petitioner was ultimately charged and convicted of carrying a concealed weapon ("CCW"), resisting and obstructing a police officer ("R&O), operating under the influence of intoxicating liquor per se ("OUIL"), possession of a weapon while under the influence of alcohol ("PWWI"), and driving while license suspended ("DWLS"). (Res. Opp. to Pet. Brief to Mich. Ct. App., Ex. F, p 148).

Petitioner appealed his multiple criminal convictions. The Michigan Court of Appeals, in a published decision, affirmed. (Pet. Appx. 14a). Petitioner sought leave to appeal to the

Michigan Supreme Court, which was ultimately denied. Petitioner claims that he sought review from this Court, but "Clayton R. Higgins, Jr. acting for William K. Suter, Clerk of this Court, denied Petitioner access to this Court." (Pet. 8).

In October 2002, Petitioner filed suit against Respondents in the Circuit Court for the County of Oakland, State of Michigan. The Complaint alleged the following: Count I - Negligence; Count II - Assault and Battery, Medical Battery, Rape; Count III - Unauthorized Release of Medical; and Count IV - Conversion and damaged personal property. (Compl.).

As discovery progressed, it became apparent that this lawsuit was just the latest in a long line of attempts by Petitioner to blame everyone but himself for his problems. Petitioner was terminated from his employment with Canadian National Railway for his bizarre and often despicable behavior. For example, on September 13, 2001, Petitioner sent an e-mail to coworkers with video images of the horrific September 11, 2001 attacks and, in addition, the following quote from Nostradamus: "In the City of God there will be a great thunder, two brothers torn apart by chaos, while the fortress endures, the great leader will succumb. The third big war will begin when the big city is burning. On the 11th day of the 9th month that . . . two metal birds would crash into two tall statues . . . in the new city . . . and the world will end soon after." (Res. Opp. to Pet. App. to Mich. Sup. Ct., Ex. H). Petitioner also was repeatedly disciplined for consistently e-mailing his superiors demanding under what authority his employer was withholding federal taxes from his pay. (Id.).

Based upon the fact that Respondents were statutorily immune from suit, Respondents filed a motion for summary disposition. The trial court granted Respondents' motion and dismissed the case with prejudice. The Michigan Court of Appeals, in an unpublished decision, affirmed. (Pet. Appx. 2a). Petitioner sought leave to appeal from the Michigan Supreme Court, which was denied. (Pet. Appx. 1a).

On April 28, 2006, Petitioner filed the instant Petition. For the reasons stated in the Argument section of this Brief in Opposition, *infra*, the Petition should be denied because this Court is without jurisdiction. Furthermore, Respondents should be awarded just damages and double costs for having to respond to this frivolous Petition.

ARGUMENTS AND CITATION OF AUTHORITY

A. This Court is without jurisdiction over this Petition for a Writ of Certiorari

Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction over decisions rendered by the highest court of a State only when "the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." Before this Court may review a decision of the highest court of a State, it must appear affirmatively from the record not only that a federal question was presented to the highest court of a State having jurisdiction but that its decision of the federal question was necessary for its determination of the case. *Honeyman v. Hanan*, 300 U.S. 14, 57 S. Ct. 350, 81 L. Ed. 476 (1937). This Court has no jurisdiction to review a decision of a State court based upon non-federal

grounds. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930).

Further, Rule 10 of this Court governs jurisdiction, and provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> * * *
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Even a cursory review of the Petition reveals that no Federal or Constitutional question is asserted. While Petitioner frames his "Questions Presented" in terms of the Fourth Amendment to the United States Constitution, and cites general law applicable to the Fourth Amendment, it is

clear that Petitioner improperly asks this Court to review certain aspects of his criminal case and to resolve some perceived factual discrepancy between his criminal appeal and his civil appeal. For example, in his "Conclusion," Petitioner states:

> Respondent's [sic] claims of immunity and the Trial Courts [sic] findings are not based in fact or law. These two opinions are in direct conflict with each other as well as the holdings of this court [sic], federal law, state law, and precedent. Respondents have admitted negligence, by their failure or refusal to abide by law and their own publicly posted policies. Respondents have admitted assault and battery by their failure to get consent, a warrant or a court order before touching Petitioner. The evidence below is also clear that the Respondent's [sic] released medical records of the Petitioner in violation of the very statute they now seek immunity from. (Pet. 27).

It is clear from reading the Petition that Petitioner is merely asking this Court to overturn both decisions of the Michigan Court of Appeals because Petitioner believes there is a factual inconsistency. Nowhere in the Petition does Petitioner make a cognizable Constitutional argument. Therefore, this Court is without jurisdiction and the Petition should be dismissed.

Moreover, even if the Petition could be read as somehow raising a Federal or a Constitutional question, this Court would nevertheless be without jurisdiction because no Federal or Constitutional question was ever presented to the trial court, the Michigan Court of Appeals or the Michigan Supreme Court.

The following are the "Questions Presented" by Petitioner to the Michigan Court of Appeals:

1. Whether the Statute in question (MCL § 333.6501 et seq.), as interpreted and applied by the Circuit Court is applicable considering the facts and circumstances presented, i.e. did Plaintiff-Appellant appear "to be incapacitated in a public place" (MCL § 333.6501(1)) and was he taken by Police for a determination of capacity pursuant to the statute (MCL § 333.6502(2))? The Circuit Court states: Yes, Plaintiff-Appellant states: No.

2. Whether Plaintiff-Appellant was "under arrest" pursuant to (MCL § 333.6501(5)) or in "protective custody" pursuant to (MCL § 333.6501(1))? The Circuit Court made no response. Plaintiff-Appellant states: Yes to the first, No [sic] to the second.

3. Whether Plaintiff-Appellant was found to be "incapacitated" by Defendants-Appellees? (MCL § 333.6504). The Circuit Court states: Yes, Plaintiff-Appellant states: No.

4. Whether the Statute provides for drug and alcohol testing without some form of consent absent a warrant or court order? (MCL § 333.6502(1)). The Circuit Court states: Yes, Plaintiff-Appellant states: No.

5. Whether the Statute provides for release of Medical Records absent consent or court

order? (MCL § 333.6521). The Circuit Court states: Yes, Plaintiff-Appellant states: No.

6. Whether the Plaintiff-Appellant has the right to "informed consent" with respect to medical treatment or drug and alcohol testing (MCL § 333.6502(1))? The Circuit Court made no response, Plaintiff-Appellant states yes.

7. Whether the Plaintiff-Appellant has the right to refuse medical treatment? The Circuit Court made no response, Plaintiff-Appellant states: Yes.

8. Whether the Trial Court examined the statute in its entirety to determine the Legislative intent before making its ruling? The Circuit Court made no response, Plaintiff-Appellant states: No.

9. Whether the Statute (MCL § 333.6501 et seq.) as interpreted and applied by Trial Court [sic] unconstitutional? The Circuit Court made no response, Plaintiff-Appellant states: No.

10. Whether the failure of Defendant-Appellees [sic] to comply with the Statute constitutes "willful and wanton misconduct" pursuant to MCL § 333.6508(2)? The Circuit Court made no response, Plaintiff-Appellant states: Yes. (Pet. Brief. to Mich. Ct. App.)

Even though Petitioner listed a question presented regarding the constitutionality of M.C.L. 333.6501, Petitioner averred that the statute was indeed constitutional. Moreover,

no argument was actually set forth in Petitioner's Brief that M.C.L. 333.6501 was constitutional.

When Petitioner filed his Application for Leave to Appeal to the Michigan Supreme Court, which was denied, he presented only one question for review: "Was Plaintiff-Appellant under arrest or not under arrest and in protective custody when brought to Defendants-Appellees' establishment October 4, 2000?" (Pet. App. to Mich. Sup. Ct.).

Petitioner was required by this Court's Rules to set forth the time and manner in which the Federal question was asserted. Rule 14(g)(i) provides that a petition for a writ of certiorari must contain:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method and manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. . .

Petitioner failed to comply with this Court's rules. The reason for the noncompliance is simple; Petitioner **never** raised a Federal or Constitutional question. This case is and always has been a frivolous action for assault and battery

under Michigan law. This simply is not an action brought under 42 U.S.C. § 1983, which is the proper method for asserting a Constitutional violation.

Additionally, Petitioner's lengthy discussion of Michigan law as it relates to the disclosure of medical records is irrelevant and does not present a federal question sufficient to give this Court jurisdiction.

Because Petitioner has raised nothing even remotely resembling a Federal or Constitutional question, this Court is without jurisdiction and the Petition should be dismissed.

Even though it is abundantly clear that this Court is without jurisdiction over this Petition, Respondents, for the sake of completeness, shall nevertheless respond to Petitioner's frivolous arguments.

B. The decision of the Michigan Court of Appeals was correct for the reason that Respondents are statutorily immune from suit

Petitioners argument centers on the contention that the panel of the Michigan Court of Appeals in his criminal case held that he was "under arrest," while the panel of the Michigan Court of Appeals in this case held that he was "in protective custody." This Petition is frivolous precisely for the reason that, even if there was a distinction, Respondents are granted statutory immunity from civil suit in both instances.

M.C.L. 333.6501 outlines the procedure to be used when a law enforcement officer seeks to take an incapacitated, i.e., severely intoxicated, person into "protective custody." M.C.L. 333.6501(5) mandates that the same procedure be

used when the individual is arrested for a misdemeanor. M.C.L. 333.6508(1) provides that a "law enforcement officer, a member of the emergency service unit, or staff member of an approved service program or an emergency medical service who acts in compliance with this part is acting in the course of his or her official duty and is not criminally or civilly liable therefor."

M.C.L. 257.625a provides the procedures for obtaining a chemical analysis of the blood and urine of a person who is under arrest for operating a vehicle while intoxicated. M.C.L. 257.625a(6)(c) provides:

> Liability for a crime or civil damages predicated on the act of withdrawing or analyzing blood and related procedures does not attach to a licensed physician or individual operating under the delegation of a licensed physician who withdraws or analyzes blood or assists in the withdrawal or analysis in accordance with this act unless the withdrawal or analysis is performed in a negligent manner.

Therefore, regardless of whether Petitioner was "in protective custody" or "under arrest" for a misdemeanor under M.C.L. 333.6501, or was "under arrest" for OUIL under M.C.L. 257.625a, Respondents are entitled to immunity via M.C.L. 333.6508(1) or M.C.L. 257.625a(6)(c). Moreover, pursuant to M.C.L. 257.625c, Petitioner consented to the chemical tests performed by Respondents.

In *Rudy v. Holmberg*, Unpublished Per Curiam Decision of the Michigan Court of Appeals, No. 214626 (January 18, 2000)(Res. Opp. to Pet. App. to Mich. Sup. Ct., Ex. M), a panel of the Michigan Court of Appeals examined an analogous situation. In *Rudy*, the plaintiff, unconscious as a

result of intoxication, was arrested for operating under the influence of alcohol. The plaintiff was taken to a hospital where blood and urine samples were involuntarily taken. The plaintiff thereafter filed a lawsuit alleging assault and battery against the defendant doctor.

The Michigan Court of Appeals found that the situation was governed by M.C.L. 333.6501. The court stated:

> Under its own terms, MCL 333.6501(5); MSA 14.15(6501)(5) does not require that an arrestee need medical attention, but only requires that an officer takes the arrestee to a facility for medical treatment. However, MCL 333.6502(2); MSA 14.15(6502)(2) indicates when medical attention is necessary for a person brought to a medical facility. That section states in part that "an individual who, by medical examination, is found to be incapacitated shall then receive treatment from an approved service program or emergency medical service." Defendant McNinch and the hospital nurse thought plaintiff needed some initial care to determine whether further treatment was necessary.
>
> Further, this Court previously articulated when medical care is appropriate for an intoxicated person . . . This Court held that a jail official's actions would be deliberately indifferent if he did not obtain medical attention for an intoxicated prisoner exhibiting assaultive, violent behavior.

The court then turned its attention to the plaintiff's argument that the defendants were not entitled to immunity. The court explicitly found that M.C.L. 333.6508 entitled the defendants to immunity.

Likewise, the Michigan Court of Appeals in this case expressly found that M.C.L. 333.6501 controlled. The court stated that "[a]lthough the record does not indicate that police told plaintiff he was being held in protective custody and not under arrest, failure to do so does not automatically transform what happened into an arrest." (Pet. Appx. 6a). The court found that Respondents were entitled to immunity pursuant to M.C.L. 333.6508.

Petitioner spends much time arguing whether an "accident" had actually occurred. Such argument only further demonstrates the frivolous nature of this Petition. Whether or not an "accident" occurred is not, and has never been, an issue in this case. Rather, whether an "accident" occurred was litigated in Petitioner's criminal case. Clearly, Petitioner is improperly attempting to argue aspects of his criminal case before this Court. Nevertheless, the Michigan Court of Appeals, in Petitioner's criminal case, clearly found that an "accident" occurred. *People v Green*, 260 Mich. App. 392, 409; 677 N.W.2d 363 (2004).

Additionally, Petitioner's lengthy discussion of Michigan law as it relates to the disclosure of medical records is irrelevant. The two statutes cited, M.C.L. 257.625a and M.C.L. 333.6508 clearly grant Respondents immunity for any and all civil actions arising out of this incident, including Petitioner's frivolous claim that Respondents improperly released medical records.

For Petitioner to claim that he was and is entitled to maintain an action against Respondents in spite of their statutory immunity is patently frivolous. Surely, if Respondents had not provided necessary medical treatment to Petitioner and Petitioner had sustained injuries, Petitioner would no doubt claim that Respondents would be liable.

Respondents had a duty, when presented with a person exhibiting erratic, violent and bizarre behavior, to determine if the behavior was caused by severe intoxication or a serious medical condition in need of immediate treatment. This is precisely the reason why Michigan law grants immunity to Respondents, and why this Petition is frivolous and should be denied.

C. The decision of the Michigan Court of Appeals was correct because Respondents' actions in no way implicated the Fourth Amendment

Assuming *arguendo* that Petitioner raised a colorable Constitutional claim, even though it is clear that he has not, this Petition should nevertheless be denied because this Court has previously ruled that tests similar to those conducted in this case do not violate the Fourth Amendment.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 613, 109 S. Ct. 1402, 1411, 103 L. Ed. 2d 639, 657 (1989). The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction. *Id.* at 613-14, 109 S. Ct. at 1411, 103 L. Ed. 2d at 657. Before this Court considers whether the tests at issue were reasonable under the Fourth Amendment, the Court must inquire "whether the tests are attributable to the Government or its agents. . . " *Id.* at 614, 109 S. Ct. at 1411, 103 L. Ed. 2d at 657.

The Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party. *Id.*

In this case, it is beyond argument that Respondents are private parties. Therefore, the only way in which the Fourth Amendment could apply is if Respondents were acting as instruments or agents of the Government. *Id.*

Respondents were not acting as agents or instruments of the Government; rather, Respondents were acting in a manner common to hospital emergency room personnel faced with a seriously intoxicated patient. Petitioner was brought to the emergency room by Community EMS. Respondents had a professional duty to treat Petitioner to determine if he was suffering from any medical condition other than severe intoxication.

There is no evidence in the record that Respondents were asked to conduct a blood test solely for the purpose of prosecuting Petitioner for OUIL. Rather, the blood and urine tests were taken during the course of Petitioner's medical treatment. "Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities." *Skinner*, 489 U.S. at 614, 109 S. Ct. at 1411, 103 L. Ed. 2d at 1412. In this case, there is no evidence that the Wixom Police participated in Petitioner's medical treatment; complete discretion as to the best course of treatment was left solely to Respondents. Accordingly, this Petition is frivolous; no violation of the Fourth Amendment can be asserted.

Even if Respondents could somehow be considered agents or instruments of the Government (though they clearly are not), the Fourth Amendment would nevertheless be inapplicable. In *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), this Court held that a State could direct that a blood sample be withdrawn from a

motorist suspected of driving while intoxicated, despite his refusal to consent to the intrusion. In *Skinner*, *supra*, this Court reiterated the holding of *Schmerber*:

> We noted that the test was performed in a reasonable manner, as the motorist's "blood was taken by a physician in a hospital environment according to accepted medical practices." [Citation omitted]. We said also that the intrusion occasioned by a blood test is not significant, since such "tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." [Citation omitted]. *Schmerber* thus confirmed "society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's privacy an bodily integrity."

489 U.S. at 625, 109 S. Ct. at 1417, 103 L. Ed. 2d at 665.

Therefore, this Court has already determined the issue - the type of tests performed in this case do not violate the Fourth Amendment.

Petitioner has not asserted a Constitutional claim. A review of the Petition reveals a confusing and unclear assertion of the argument that the decisions of the Michigan Court of Appeals in Petitioner's criminal case and civil case are inconsistent. While Petitioner cites general language regarding the Fourth Amendment, Petitioner fails to explain how Respondents' conduct relates thereto. "The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of

the points requiring consideration is sufficient reason for the Court to deny a petition." Rule 14(4).

Even if Petitioner had skillfully asserted a Constitutional claim, which he has not, as described above, Respondents' conduct in no way implicated or violated the Fourth Amendment. Accordingly, this Petition should be denied.

D. This Petition is frivolous, and is aimed only at harassing Respondents; therefore, Respondents are entitled to damages and double costs

Rule 42 provides, *inter alia*:

> When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

Rule 42(2). Rule 43(7) provides that "[i]n extraordinary circumstances the Court may adjudge double costs."

As demonstrated in Argument Sections A-C above, this Petition clearly is frivolous. Since the inception of this lawsuit, Petitioner's aim seems to be harassment of Respondents, who unquestionably followed established procedure and Michigan law in treating Petitioner. Respondents have been forced to expend considerable resources defending this frivolous case at the trial court level, the Michigan Court of Appeals, the Michigan Supreme Court, and now, amazingly, this Court.

The undisputed fact is that Petitioner has **never** raised *anything even remotely resembling a Federal question.* This case has always been about Petitioner's desire to receive money damages for the claimed "assault." Now, after "striking out" at all levels of the Michigan court system, Petitioner has conjured up some imaginary Federal question. Yet, reviewing the Petition reveals that Petitioner has not even properly made a Federal question argument. Rather, Petitioner quotes some boilerplate Fourth Amendment law and continues to assert the same frivolous, factual arguments that were rejected at all levels of the Michigan courts.

Additionally, apparently believing that he was "denied access to this Court," Petitioner boldly asserts arguments which clearly only concern his criminal case. For example, Petitioner spends much time arguing whether or not an "accident" occurred. Whether or not an "accident" occurred was and has never been an issue in this case; rather, it was an issue decided by the Michigan Court of Appeals in Petitioner's criminal case. (Pet. Appx. 30a).

Petitioner has filed this Petition in violation of 28 U.S.C. § 1257, and this Court's Rules. It is patently obvious that this Court is without jurisdiction over this Petition. Moreover, Petitioner failed "to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration" in violation of Rule 14(4). Petitioner also violated Rule 12(3) by failing "to notify all respondents promptly, on a form suppled by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case." Luckily, Respondents were able to adduce this information via this Court's web site.

Therefore, because this Petition is just the latest in a long line of frivolous, harassing pleadings, Respondents should be awarded just damages, including reasonable attorney fees, and double costs for having to defend this clearly frivolous Petition.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated above, Respondents request that this Honorable Court deny this Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan, as this Court is without jurisdiction. Additionally, Respondents request that this Court award them just damages, including reasonable attorney fees, and double costs for having to defend this clearly frivolous Petition.

Respectfully submitted,

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James T. Mellon,
Counsel of Record
2301 West Big Beaver Road
Suite 500
Troy, Michigan 48084-3328
(248) 649-1330